Supreme Court, U.S.
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No. 03-21

IN THE

Supreme Court of the United States

CHAUNCE WINDLE,

Petitioner,

v.

CITY OF MARION, INDIANA, a municipal corporation, CITY OF MARION, INDIANA POLICE DEPARTMENT, and ROB RAYMER, SERGEANT, in his official and individual capacity,

Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

1. Whether the Seventh Circuit erred in finding no liability under due process for a "state created danger" when police officers listened for entertainment purposes to the sexual abuse of a child, took no actions to protect the child, and prevented fellow officers from assisting the child.

2. Whether the Seventh Circuit erred in finding that police officers' conduct was not deliberately indifferent and did not "shock the conscience" when the officers heard a child being emotionally and sexually abused, knew the victim's identity, and took steps to prevent fellow officers from assisting the child.

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IN THE

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No. ___

CHAUNCE WINDLE,

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CITY OF MARION, INDIANA, a municipal corporation, CITY OF MARION, INDIANA POLICE DEPARTMENT, and ROB RAYMER, SERGEANT, in his official and individual capacity,

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Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

Chaunce Windle respectfully requests that this Court issue a Writ of Certiorari to review the judgment entered in this case by the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The decision of the Seventh Circuit denying the Petition for Rehearing is reported at No. 02-2363, 2003 U.S. App. LEXIS 6338 (7th Cir. April 1, 2003) and is reproduced in App. A. The Opinion of the Seventh Circuit is reported at 321 F.3d 658 (7th Cir. 2003) and is reproduced in App. B.

The Judgment in a Civil Case of the United States District Court for the Northern District of Indiana is reproduced in App. C. The Memorandum Opinion and Order of the United States District Court for the Northern District of Indiana is reported at 196 F.Supp.2d 750 (N.D. Ind. 2002) and is reproduced in App. D.

JURISDICTION

The Opinion of the United States Court of Appeals for the Seventh Circuit was issued on March 3, 2003. A timely Petition for Rehearing was denied by that Court on April 1, 2003. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTE INVOLVED IN THE CASE

42 U.S.C. § 1983. Civil action for deprivation of rights

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT OF THE CASE

In the fall of 1997, officers from the City of Marion Police Department began to intercept cell phone conversations via

their police scanners. The police officers listened to conversations that were sexually and emotionally abusive in nature and involved an adult female, Carol Rigsbee (hereinafter designated as "Rigsbee"), and a minor female child, Chaunce Windle (hereinafter designated as "Chaunce"). Police officers admitted to listening to the conversations when things were "slow" on the job, and they described the activity between the adult female and minor child with the unusual name as "sick." The officers continued to listen to the conversations after they knew the identity of the adult and the child. In fact, by telling a superior that he had already reported the abuse when he had not, Sergeant Rob Raymer (hereinafter designated as "Raymer") took steps to prevent fellow officers from intervening on behalf of the child. Lieutenant Alter-Dunn dissuaded a subordinate from intervening by telling him there was nothing they could do because they had obtained the information by illegal intercept. Her words were viewed as a directive not to intervene.

Chaunce, the minor child victim, filed her Complaint on December 15, 2000, alleging that the Defendants violated her rights under 42 U.S.C. § 1983 and under the Fourteenth Amendment of the United States Constitution because their act of increasing her vulnerability to her abuser merely for their own entertainment purposes when they knew Chaunce's identity and the identity of her abuser rose to the level of outrageous and conscience shocking. Further, Chaunce alleged in her Complaint that the City of Marion maintained a policy of not training its officers to investigate child abuse that led to the violation of her constitutional rights. As a result of the Defendants' actions, Chaunce suffered physical and emotional injury. Chaunce's therapist, Ann Presnall, described her as "desperate" and stated that it was inappropriate to allow her continued exposure to her abuser. In addition to the physical harm the Defendants' actions allowed Rigsbee to inflict upon Chaunce, Ms. Presnall noted that the emotional manipulation was very destructive to Chaunce. Chaunce

testified that she felt trapped and brainwashed and that each time she was molested her emotional state worsened. Chaunce stated that had the Defendants acted thirty (30) days sooner it would have spared her a month of pain.

On January 6, 2002, Defendants filed a Motion for Summary Judgment. Chaunce filed her Memorandum in Opposition to Defendants', City of Marion, Indiana and Sergeant Rob Raymer, Motion for Summary Judgment on March 1, 2002. The United States District Court for Northern District of Indiana entered its Judgment and Memorandum of Decision and Order on April 25, 2002, granting the Defendants' Motion for Summary Judgment. In finding no genuine issue of material fact, the District Court held that the Defendants neither created a foreseeable danger nor placed Chaunce in a dangerous position that was foreseeable. App. D, pg. 22a, Memorandum of Decision and Order. Thus, the District Court found no underlying constitutional violation of Chaunce's substantive due process rights. On May 31, 2002, Chaunce filed her Notice of Appeal. The Seventh Circuit Court of Appeals filed its Final Judgment for Defendants and against Chaunce on March 3, 2003. Chaunce filed a timely Petition for Rehearing on March 14, 2003. The Seventh Circuit entered its order denying Chaunce's Petition for Rehearing on April 1, 2003. App. A, pg. 1a.

REASONS FOR GRANTING THE WRIT

I. THIS COURT SHOULD GRANT CERTIORARI TO RESOLVE A CONFLICT AMONG THE CIRCUITS CONCERNING WHEN THE GOVERNMENT MAY BE HELD LIABLE FOR A "STATE CREATED DANGER."

The United States Supreme Court has held that the government's failure to protect a citizen does not rise to the level of constitutional violation in a 42 U.S.C. § 1983 action. *DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S.

189 (1989). However, in the same Opinion the Supreme Court found, "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201. With this sentence, this Court established what appellate courts have deemed the "State-Created Danger Theory." It is against this backdrop that Chaunce brought her § 1983 suit.

The circuit courts agree that the theory is a valid claim upon which plaintiffs may state a claim in § 1983 actions. The difficulty arises, however, in the test the district and circuit courts utilize to determine whether the government is liable under the State-Created Danger Theory. The circuits are split in the manner in which they make this outcome-determinative decision.

The Seventh Circuit has defined the State-Created Danger test by holding:

> *Monfils*, along with our other cases dealing with this issue, suggest that the key question in determining whether state behavior violated the victim's constitutional right is: "What actions did [the state actor] affirmatively take, and what dangers would [the victim] otherwise have faced?"

Windle v. City of Marion, 321 F.3d 658, 661 (7th Cir. 2003) (quoting *Monfils v. Taylor*, 165 F.3d 511, 517 (7th Cir. 1998), *rehearing denied*, *Windle v. City of Marion,* No. 02-2363, 2003 U.S. LEXIS 6338 (7th Cir. April 1, 2003).

Under the Seventh Circuit test applied in Chaunce's case, the Court first considered the actions the state actor, the City of Marion Police Department and individual officers, affirmatively took. The Seventh Circuit refused to consider the Defendants' affirmative acts of dissuading fellow officers from intervening because the Seventh Circuit viewed these arguments as waived. *Id.* at 662, footnote 3. However, the

Court did acknowledge Chaunce's arguments that the Defendants took specific, affirmative actions that prevented fellow officers from assisting her. *Id.* The Court deemed Chaunce's argument waived in spite of the fact that she had made the argument in her Plaintiff's Memorandum in Opposition to Defendants', City of Marion, Indiana and Sergeant Rob Raymer, Motion for Summary Judgment, in her brief of the Appellant, in her Reply Brief, and in her rebuttal at oral argument before the Seventh Circuit. *Id.* Chaunce's Petition for Rehearing focused on her argument that she had not waived the issue of the Defendants' affirmative actions of preventing fellow officers from intervening on her behalf.

The second prong of the Seventh Circuit test for liability under the State-Created Danger Theory entails consideration of what dangers the victim would have faced had the state not acted. The record indicates that had officers not been dissuaded from assisting Chaunce, the abuse would have stopped much sooner than it did, and the harm to the child would not have been as severe. Ann Presnall, Chaunce's therapist, testified that continued exposure to her abuser increased the harm to Chaunce. The Seventh Circuit's overly restrictive analysis of the State-Created Danger Theory, under the facts of this case, has left Chaunce without justice.

The Third Circuit has defined the test for a State-Created Danger claim under § 1983 by considering whether:

> (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; and (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.

Estate of Smith v. Marasco et al., 318 F.3d 497, 506 (3rd Cir. 2003). *See also Schieber v. City of Philadelphia*, 320 F.3d

409, 417 (3rd Cir. 2003)(test for successful claim under State-Created Danger Theory).

The Third Circuit test differs from the Seventh Circuit approach in several ways. The Third Circuit considers whether the harm was foreseeable and fairly direct. The Seventh Circuit did not consider whether the harm was foreseeable despite the evidence Chaunce provided to prove the Defendants were aware that abuse is harmful to children. The Seventh Circuit also did not consider the second prong of the Third Circuit's test, whether the Defendants acted in willful disregard for the safety of the plaintiff. In this case, the Defendants admitted that they were being entertained by the intercepted phone conversations. Allowing the abuse to continue and taking steps to prevent intervention on the child's behalf displays a willful disregard for the safety of Chaunce. The third prong of the Third Circuit test requires that there be some relationship between the state and the plaintiff. The Seventh Circuit test does not include this prong. This prong of the Third Circuit test, however, seems to overlook non-custodial situations where the state has created or enhanced a plaintiff's danger. The Seventh Circuit also did not consider the fourth prong of the Third Circuit test, whether the state actors used their authority to create an opportunity for the third person's crime to occur that otherwise would not have existed. Had the Seventh Circuit considered this factor, it would have determined from the record that had the Defendants not affirmatively acted to prevent others from assisting Chaunce, Rigsbee would not have inflicted the additional multiple harmful molestations on Chaunce.

The Fifth Circuit applies a two part test to determine whether a plaintiff has stated a claim: ". . . (1) the state actors created or increased the danger to the plaintiff and (2) the state actors acted with deliberate indifference." *Morin v. Moore, et al.*, 309 F.3d 316, 322 (5th Cir. 2002). Relative to "deliberate indifference," the United States Supreme Court

has held, "As our decision in *Canton* makes clear, 'deliberate indifference' is a stringent standard of fault, requiring proof that a municipal actor disregarded a known or obvious consequence of his action." *Bd. of the County Comm'rs v. Brown*, 520 U.S. 397, 410 (1997).

The Fifth Circuit test differs from the Seventh Circuit test in that the Seventh Circuit does not consider whether the state actors acted with deliberate indifference. The Seventh Circuit test does not consider evidence in the record that reveals Defendants disregarded the fact that they knew the consequences of abuse are harmful to children. Chaunce would have prevailed under the Fifth Circuit test because the Defendants' actions increased the harm to Chaunce, and they acted in disregard of a known and obvious consequence—further molestations of the child. Such actions, according to this Court, constitute deliberate indifference. *Id.* The record is replete with facts that the Defendants increased Chaunce's harm by allowing continued exposure to her abuser for their own entertainment when the Defendants knew that continued exposure to a molester would be harmful to an abuse victim.

In the Sixth Circuit, a plaintiff must be successful in establishing the elements of a two-part test in order to state a claim under the State-Created Danger Theory:

> In *Sargi*, this Court stated: "Liability under the state-created danger theory must be 'predicated upon the states' affirmative acts which work to plaintiffs' detriments in terms of exposure to danger." 70 F.3d at 913 (quoting *D.R. v. Middle Bucks Area Vocational Technical Sch.*, 972 F.2d 1364, 1374 (3rd Cir. 1992)). This Court in *Kallstrom* also required the plaintiff to prove that she faced a special danger from the affirmative actions of the state:
>
> > However, because many state activities have the potential to increase an individual's risk of harm, we require plaintiffs alleging a constitutional tort under

> § 1983 to show "special danger" in the absence of a special relationship between the state and either the victim or the private tortfeasor. The victim faces "special danger" where the state's actions place the victim specifically at risk, as distinguished from a risk that affects the public at large.
>
> 136 F.3d at 1066.

Jones v. Union County, 296 F.3d 417, 430 (6th Cir. 2002)(quoting *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1066 (6th Cir. 1998).

While the Sixth Circuit test considers the state's affirmative actions that increase harm to the plaintiff, unlike the Seventh Circuit, the Sixth Circuit also requires that the state's actions place a victim specifically at risk rather than a risk that might affect the public at large. Had the Seventh Circuit considered that element, the record would have revealed that the Defendants' actions of dissuading fellow officers from assisting Chaunce increased her harm and placed her specifically at risk rather than placing children in the public at large at risk.

Yet another test is applied in the Tenth Circuit:

> To make out a proper danger creation claim, a plaintiff must demonstrate that (1) the charged state entity and the charged individual actors created the danger or increased plaintiff's vulnerability to the danger in some way; (2) plaintiff was a member of a limited and specifically definable group; (3) defendants' conduct put plaintiff at substantial risk of serious, immediate, and proximate harm; (4) the risk was obvious or known; (5) defendants acted recklessly in conscious disregard of that risk; and (6) such conduct, when viewed in total, is conscience shocking.

Currier v. Doran, 242 F.3d 905, 918 (10th Cir. 2001), *cert. denied*, 534 U.S. 1019 (2001).

The comprehensive test utilized by the Tenth Circuit is significantly different from the test applied in the Seventh Circuit. The Tenth Circuit test appears to combine elements of many of the tests applied in other circuits and considers more circumstances surrounding a plaintiff's claim. The standard for liability under the State-Created Danger Theory applied by the Seventh Circuit excludes consideration of many of the circumstances surrounding a claim.

Applying the test utilized by the Tenth Circuit in *Currier*, Chaunce met each element. Under the first element, that the charged entity and individual actors create the danger or increase plaintiff's vulnerability to the danger in some way, the Defendants took affirmative actions that prevented Chaunce's removal from the clutches of her abuser. The Seventh Circuit found, as a matter of law, that Defendants' actions did not make Chaunce's situation worse despite acknowledging Chaunce's arguments that certain of the Defendants responded to Chaunce's plight with specific, affirmative actions that prevented fellow officers from assisting the child. *Windle*, 321 F.3d at 662, footnote 3. The Defendants' actions that increased the harm to Chaunce included listening to the abuse for entertainment rather than stopping the harm. Despite finding that the Defendants did not increase the harm to Chaunce, the Seventh Circuit noted, "Only when Raymer intercepted a phone conversation on November 24, 1997, that led him to believe that Chaunce was in danger of doing something drastic and was possibly suicidal did he decide to act." *Id.* at 660. The Court's statement reveals the Defendants' acknowledgement of the increased harm to Chaunce. They allowed the harm to escalate until Chaunce was desperate enough to do something drastic. Only then, did the Defendants choose a child's safety over their misguided and perverted entertainment.

With regard to the second prong of *Currier*, that the plaintiff be a member of a limited and specifically definable

group, Chaunce was a member of such a group. She was a minor child with an unusual name in the community, and the Defendants knew her identity. This was not a situation where the risk of harm was increased to some unknown and innumerable group of children such as all students at the middle school where the abuser worked. Rather, the harm was increased by the actions of the Defendants to a specific and known child.

Defendants fall within the third prong of the test because their behavior put Chaunce at risk of serious, immediate, and proximate harm. There can be no doubt that exposure to a molester is harmful to a child. Chaunce provided both the United States District Court for the Northern District of Indiana and the Seventh Circuit with evidence from her therapist, Ms. Presnall, that she had been harmed by continued and repeated exposure to her abuser. As well, she provided the Court with evidence that the Defendants were aware that exposure to an abuser was harmful to a child. Despite this evidence, neither the District Court, nor the Seventh Circuit acknowledged Ms. Presnall's testimony underscoring the danger to Chaunce that was enhanced by the Defendants' actions.

The fourth prong of the analysis requires that the risk be obvious or known. The police listened to the abuse, received reports of said abuse, and had investigated molestations in the City in the past. Raymer knew something "sick" was going on. The risk of harm that the Defendants' actions placed Chaunce in was known and obvious. In fact, the police chose to sacrifice their entertainment to help the child only when they had allowed the harm to escalate to a point where Chaunce spoke of suicide or of running away.

The fifth prong of the *Currier* analysis requires that the Defendant act in a reckless manner with conscious disregard of the risk. This prong of the test is also met by the Defendants' lack of immediate intervention and failure to

follow a clearly established state statute, demonstrating their reckless and conscious disregard of the increased vulnerability that Chaunce faced.

Finally, the sixth prong of the *Currier* test requires that the conduct of the Defendants, when viewed in total, be conscience shocking. The actions of the Defendants, when viewed in their totality, should have shocked the conscience of the Seventh Circuit Court of Appeals. The record reveals that the police listened to cell phone conversations when they were bored on third shift. The Seventh Circuit noted this evidence by finding, "A possible implication from the record and from Chaunce's allegations is that the officers continued to listen to the conversations for the sake of personal entertainment." *Id.* The Defendants knew the identity of the child victim of sexual molestation well before they intervened. Further, Raymer took steps that discouraged others from intervening on Chaunce's behalf. Chaunce has satisfied each prong of the Tenth Circuit *Currier* holding.

Despite these facts, under the Seventh Circuit analysis of a State-Created Danger claim, Chaunce is left a victim without justice. The current state of the law in the Seventh Circuit is such that a police officer, whose car bears the phrase "To Protect and Serve," may listen for entertainment purposes to the direct abuse of a child, know the child's identity, know the perpetrator's identity, take steps to prevent fellow officers from intervening on behalf of the child and not be held accountable for those actions. This outcome cannot be what this Court intended under its decision in *DeShaney*.

While the United States Supreme Court acknowledged the State-Created Danger exception to the holding in *DeShaney*, the Court has yet to provide guidance to lower courts regarding interpretation and application of the exception. Because the issue of whether the state created the danger a plaintiff faced is out-come determinative in deciding whether a constitutional violation occurred under the *DeShaney* exception,

the parameters of the test a circuit court of appeals applies will literally determine whether a plaintiff "gets her day in court." Some circuits apply only a two-pronged test, while other circuits consider more of the surrounding circumstances in evaluating the government's liability under the State-Created Danger Theory.

The end result of the various tests applied in the circuit courts is that a plaintiff's justice is dependent upon the circuit in which her claim is filed. Had Chaunce's suit been filed in the Tenth Circuit, where the test includes consideration of more of the surrounding circumstances, Chaunce would have had her day in court. Had Chaunce been fortunate enough to reside in the Sixth Circuit, she would have prevailed on her claim. The varying tests utilized by the Circuits to determine whether the State created the danger a plaintiff encounters leads to an environment where justice is predicated not upon a consistent application of the law, but is determined by circuit boundaries.

The issue of when the government is liable for State-Created Danger arises in a large number of § 1983 cases. Both plaintiffs and defendants would benefit by clarification of the issue. Thus, it is imperative that the United States Supreme Court provide the circuit courts of appeal with clarification of this important issue of federal law.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF APPEALS ERRED IN DENYING LIABILITY FOR CONDUCT BY GOVERNMENT OFFICERS THAT WAS DELIBERATELY INDIFFERENT AND CONSCIENCE-SHOCKING.

The United States Supreme Court has held: "Thus, in a due process challenge to executive action, the threshold question is whether the behavior of the governmental officer is so egregious, so outrageous, that it may fairly be said to

shock the contemporary conscience." *County of Sacramento v. Lewis*, 523 U.S. 833, 847 (1998). Here, and contrary to the law of the United States Supreme Court, the Seventh Circuit did not consider the "threshold question."

A. The Marion Police Department, its officers and the City of Marion all displayed deliberate indifference to Chaunce's plight.

The United States Supreme Court addressed the theory of deliberate indifference in its Opinion in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998). There, the Court held that the deliberate indifference standard is applicable only where actual deliberation is practical. *Id.* at 851.

Chaunce argued in her Plaintiff's Memorandum in Opposition to Defendants', City of Marion, Indiana and Sergeant Rob Raymer, Motion for Summary Judgment, in her Brief of the Appellant, and in her Reply Brief that the Defendants acted with deliberate indifference to her plight. The record reveals that the officers listened to the sexual and emotional abuse of Chaunce over their police scanners for entertainment purposes when things were slow on third shift. The Seventh Circuit acknowledged this evidence in the record by finding, "A possible implication from the record and from Chaunce's allegations is that the officers continued to listen to the conversations for the sake of personal entertainment." *Windle*, 321 F.3d at 660.

Further, evidence of deliberate indifference on the part of the Defendants occurred when they did nothing to assist the child even though they knew her name and the name of the perpetrator. The Seventh Circuit noted the ease with which the Defendants could have prevented harm to Chaunce by finding:

> At some point, the officers, including Raymer, became aware of the fact that the younger female's first name was Chaunce.

> One might anticipate that a police officer armed with this information would have aggressively investigated and intervened in an attempt to protect the well-being of the minor female. Indeed, the uncommonness of the name Chaunce and the fact that some of the officers in the department knew her father and were aware of the existence of a Chaunce Windle, it appears this case would not have required a great deal of further investigative effort. Nevertheless, Raymer took no intervening action for about two months.

Id.

The Seventh Circuit's acknowledgment that Raymer did not take action to assist Chaunce for two months reveals the time that the Defendants had for deliberation in the matter. The record specifically reveals instances where the Defendants did, in fact, deliberate the matter. When Officer Henderson approached his superiors about the situation, Lieutenant Alter-Dunn told him there was nothing the department could do because the calls were illegally intercepted. The situation was discussed at roll call. Perhaps most revealing of the deliberation of the Defendants about the situation was that Raymer told Lieutenant Alter-Dunn that he had reported the case to the Prosecutor, when he had not. The Defendants had time to deliberate the situation yet chose to leave Chaunce in the clutches of her abuser, thus increasing her danger while reacting with indifference.

Chaunce further argued that the Defendants displayed deliberate indifference to her plight by failing to train the City of Marion police officers regarding their obligations under Indiana statute to report child abuse. The policymakers of the City of Marion Police Department recognized that it was foreseeable that children in Marion would be abused; yet, the City and the Police Department did nothing to train its officers to respond to such situations.

B. The actions of the Marion Police Department, its officers and the City of Marion rise to the level of conscience-shocking.

In addressing the idea of "conscience-shocking," the *Lewis* Court held:

> It is, on the contrary, behavior at the other end of the culpability spectrum that would most probably support a substantive due process claim; conduct intended to injure in some way unjustifiable by any government interest is the sort of official action most likely to rise to the conscience-shocking level.

Lewis, 523 U.S. at 849 (internal citation omitted).

Regarding the violation of Chaunce's Fourteenth Amendment Due Process rights, the Seventh Circuit ruled, "As regrettable as the delayed reaction of Sergeant Raymer and the Marion Police Department may have been, it did not violate any constitutional rights of Chaunce Windle." *Windle*, 321 F.3d at 663. Based upon the Seventh Circuit's own findings and the facts in evidence in the record, the Seventh Circuit's holding that there was no constitutional violation is contrary to the law of the United States Supreme Court. The Seventh Circuit did not address the "threshold question" spelled out in *Lewis*, 523 U.S. at 847, that being whether the Defendants' behavior is so egregious and outrageous that it shocks the conscience.

The Seventh Circuit did not consider whether the Defendants' behavior of listening to child abuse for entertainment purposes while knowing the identity of the child and the perpetrator and taking steps to prevent fellow officers from assisting the child was so outrageous as to shock the conscience given the time available for deliberation. Had the Seventh Circuit followed the law of the United States Supreme Court as spelled out in *Lewis*, an underlying constitutional violation would have been found.

In *Lewis* the Supreme Court held that under certain circumstances, deliberate indifference may rise to the level of conscience-shocking. *Id.* at 849. Significantly, the *Lewis* Court held: "When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Id.* at 853. Certainly, the Defendants had ample opportunity to "do better" by Chaunce.

Sadly, those who purport to "protect and serve" failed to care about a child's sexual and emotional abuse. The deliberately indifferent and conscience-shocking actions of the Defendants enhanced and escalated the danger Chaunce faced. In the words of the Seventh Circuit, "A State serves a compelling interest in protecting abused children." *Pesce v. J.-Sterling Morton High School, District 201, Cook County, IL, et al.*, 830 F.2d 789, 798 (7th Cir. 1987). That compelling State interest was not served by the actions of the Defendants or by the Seventh Circuit Opinion in *Windle*.

CONCLUSION

THEREFORE, Petitioner, Chaunce Windle, by counsel, respectfully requests that the Court grant her Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

[Filed April 1, 2003]

No. 02-2363

CHAUNCE WINDLE,
Plaintiff-Appellant,

v.

CITY OF MARION, INDIANA, a municipal corporation, CITY OF MARION, INDIANA, POLICE DEPARTMENT, ROB RAYMER, Sergeant, in his official and individual capacity,
Defendants-Appellees.

Before Hon. JOEL M. FLAUM, *Chief Judge*, Hon. FRANK H. EASTERBROOK, *Circuit Judge*, Hon. DIANE P. WOOD, *Circuit Judge*.

ORDER

On consideration of the petition for rehearing filed in the above-entitled case on March 14, 2003, by plaintiff-appellant, all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby DENIED.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

No. 02-2363

CHAUNCE WINDLE,
Plaintiff-Appellant,

v.

CITY OF MARION, INDIANA, a municipal corporation, CITY OF MARION, INDIANA, POLICE DEPARTMENT, and ROB RAYMER, SERGEANT, in his official and individual capacity,
Defendants-Appellees.

Appeal from the United States District Court for the Northern District of Indiana, Fort Wayne Division.
No. 1:00 CV 0468—William C. Lee, Judge

January 8, 2003, Argued
March 3, 2003, Decided

Before FLAUM, *Chief Judge*, and EASTERBROOK and DIANE P. WOOD, *Circuit Judges*.

OPINION

FLAUM, *Chief Judge*. Chaunce Windle ("Chaunce"), a minor student, was sexually molested by Carol Rigsbee ("Rigsbee"), then a middle school music teacher in Marion, Indiana. After the ongoing and inappropriate relationship between Rigsbee and Chaunce came to light, Rigsbee was prosecuted for child molestation. The case before us today is about the Marion Police Department's response to their knowledge of this improper relationship. Chaunce has

brought this 42 U.S.C. § 1983 claim against Sergeant Rob Raymer and the City of Marion for allegedly violating her due process rights by not intervening to protect her from the molestation that they were aware was occurring. The district court granted the defendants' motion for summary judgment. For the reasons stated herein, we affirm.

I. Background

Sometime in 1997 certain officers at the Marion Police Department began intercepting cellular phone conversations between Chaunce and Rigsbee on their scanners. These conversations evidenced an ongoing sexual relationship between Chaunce and Rigsbee, who had come to know Chaunce both through school and through private music lessons.

At first the officers who intercepted the calls thought they were listening to conversations between two lesbian lovers about their relationship. A possible implication from the record and from Chaunce's allegations is that the officers continued to listen to the conversations for the sake of personal entertainment. In late September or early October of 1997, Sergeant Raymer was informed by the officers of these conversations. Raymer personally intercepted several of the conversations over the next two months. Raymer became concerned when the content of the conversations revealed to him that the participants were an older female who was a middle school teacher and a younger female who was a student. At some point, the officers, including Raymer, became aware of the fact that the younger female's first name was Chaunce.

One might anticipate that a police officer armed with this information would have aggressively investigated and intervened in an attempt to protect the well-being of the minor female. Indeed, given the uncommonness of the name Chaunce and the fact that some of the officers in the department knew her father and were aware of the existence

of a Chaunce Windle, it appears this case would not have required a great deal of further investigative effort. Nonetheless, Raymer took no intervening action for about two months. Only when Raymer intercepted a phone conversation on November 24, 1997, that led him to believe that Chaunce was in danger of doing something drastic and was possibly suicidal did he decide to act. The next day he went to Kent Cocking, a school counselor at Tucker Middle School. Cocking and Raymer then spoke to Chaunce's father, Rich Windle. Raymer then spoke with Rigsbee, who admitted to molesting Chaunce. On December 2, 1997, Raymer submitted an incident report. This was the first written report filed regarding these events. Rigsbee's prosecution followed.

Chaunce brought this § 1983 suit claiming that Raymer, and the City of Marion, violated her due process rights in failing to protect her from the acts of Rigsbee. The district court held that Chaunce's allegations do not support a claim under § 1983 and granted the defendants' motion for summary judgment. Chaunce appeals.

II. Discussion

We review a district court's grant of summary judgment *de novo*. *Dykema v. Skoumal*, 261 F.3d 701, 704 (7th Cir.2001). Summary judgment is proper where there is no genuine issue as to any material fact and the moving party is entitled to a judgment as a matter of law. *Tesch v. County of Green Lake*, 157 F.3d 465, 471 (7th Cir. 1998). Therefore we must examine Chaunce's allegations to see whether the facts, construed in the light most favorable to her, establish an actionable claim under § 1983. To succeed on such a claim a plaintiff must show that: (1) the defendant deprived the plaintiff of a right secured by the Constitution and laws of the United States, and (2) the defendant acted under color of state law. *Reed v. City of Chicago*, 77 F.3d 1049, 1051 (7th Cir. 1996). The second requirement is not at issue in this case.

As to the first requirement, Chaunce claims that Raymer's inaction violated her due process rights. Generally, failure to protect does not rise to the level of a constitutional violation. *See DeShaney v. Winnebago County Dept. of Soc. Serv.*, 489 U.S. 189, 103 L. Ed. 2d 249, 109 S. Ct. 998 (1989). Recognizing this, Chaunce tries to fit her claim against Raymer into the "state-created danger exception." This approach arises out of the Supreme Court's opinion in *DeShaney*. While the Court in *DeShaney* held that a failure to protect was not a constitutional violation, it also suggested that a different outcome might result where the state has created or exacerbated the danger from which it failed to protect the victim. The Court stated: "While the State may have been aware of the dangers that Joshua faced in the free world, it played no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201. Drawing on this language the lower courts have fashioned the "state-created danger exception." *See, e.g., Reed v. Gardner*, 986 F.2d 1122, 1125 (7th Cir. 1993); *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992).

The facts in *Monfils v. Taylor*, 165 F.3d 511 (7th Cir. 1998), provide an example of the kind of behavior that falls under this exception. Thomas Monfils provided an anonymous tip to the police about the criminal activity of one of his co-workers. Monfils requested that the tape of his tip not be released because he feared violent retaliation. He was assured that it would not be released. Still the police released the tape to the accused co-worker who recognized Monfils's voice. Monfils was subsequently murdered by his co-workers. This court found an actionable claim under the state-created danger exception because the state placed Monfils in an increased position of danger and failed to protect him from that danger. *Monfils*, 165 F.3d at 517.

Appellant tries to liken the behavior of Raymer and the Marion Police in this case to the behavior that created the danger in *Monfils*. We find this argument unpersuasive. *Monfils*, along with our other cases dealing with this issue, suggest that the key question in determining whether state behavior violated the victim's constitutional rights is: "What actions did [the state actor] affirmatively take, and what dangers would [the victim] otherwise have faced?" *Id.* (quoting *Wallace v. Adkins*, 115 F.3d 427, 430 (7th Cir. 1997)); *see also Dykema*, 261 F.3d at 706. In *Monfils* we looked at the state's affirmative action of releasing the tape and the fact that, had the state not released the tape, Monfils would have faced considerably less danger. Therefore, the state enhanced the danger and by failing to protect Monfils from that danger, it violated his due process rights. With this analysis in mind Appellant attempts to show that Raymer took an affirmative action, even though he plainly did not.[1] She characterizes Raymer's inaction as an affirmative choice, using phrases like "affirmatively choosing to stand idle" and "affirmatively chose not to take action" throughout her brief. We find this line of argument lacking and not in accord with our understanding of "taking an action affirmatively."[2]

Even if one were to construe the conduct of the officers as some sort of affirmative action, we must then ask what new

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[1] In the text we discuss why the actions Appellant argues are affirmative are not. While it is true that the state did take some affirmative actions like continuing to listen to conversations, or in the end finally assisting the victim, Appellant wisely does not argue that these could possibly have increased her level of danger.

[2] The term "affirmative act" suggests a willful deviation from the *status quo*. Thus an affirmative act will have as a counterpoint a non-affirmative position. Typically, this involves inaction. Here Appellant posits a situation where not acting was an affirmative act and therefore the police were faced with the choice between affirmatively choosing to do nothing and affirmatively doing something. Under this scenario there is no non-affirmative position for the police to have taken. This is simply illogical.

danger would have otherwise befallen the victim. If Raymer, under Appellant's theory, had not taken the so-called affirmative action of doing nothing and had done something, we have no way of knowing what would have occurred. Indeed, the police might have failed at protecting Chaunce. We therefore have no assurance that the danger would not have existed in the absence of the so-called affirmative action of doing nothing.

In focusing exclusively on whether the police acted affirmatively, Appellant fails to grasp that she has to establish that the police failed to protect her from a danger *they created or made worse*. She confuses the inert failure to protect with the proactive creation or exacerbation of danger. In this case the police did nothing to create a danger, nor did they do anything to make worse any danger Chaunce already faced.[3] If the police had never overheard the conversation, and had never been involved at all, the danger faced by Chaunce would likely have been the same or perhaps worse. The police did not place Chaunce in the custody of Rigsbee, and they did nothing to assist Rigsbee. They just failed to intervene until Raymer thought that matters had reached a crisis. This case is indistinguishable from *DeShaney* where the Supreme Court concluded that no constitutional violation had occurred when state actors who may have been aware that a child was being abused by his father did nothing to protect the child. *Deshaney*, 489 U.S. at 201.

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[3] In her reply brief and in rebuttal at oral arguments, Appellant mentions that certain officers in the Marion Police Department who were concerned about the abuse of Chaunce were dissuaded from protecting her by Raymer and others. This argument is mentioned only in passing in two paragraphs of Appellant's reply brief. As such we find the argument waived and do not address the question of whether a constitutional violation would exist where one member of a law enforcement unit discouraged or prevented another from protecting a victim.

Appellant attempts to salvage her constitutional claims by alleging that the police violated their duty under an Indiana statute. With nothing more to go on than a state statute, she cannot succeed in saving her claim. State law violations do not form the basis for imposing § 1983 liability. *Estate of Novack v. County of Wood*, 226 F.3d 525, 531-32 (7th Cir. 2000); *see also White v. Olig*, 56 F.3d 817, 820 (7th Cir. 1995) ("It is therefore a truism, reiterated many times by this court, that mere allegations of state law infraction are insufficient to support a Section 1983 claim.").

Finally, we note that this opinion addresses liability when Raymer and the Marion Police are the relevant state actors. Appellant has not included in this suit a claim against Rigsbee, who as a teacher could also be considered a state actor. Rigsbee's status as a potential state actor does however raise one important question regarding the duties of the Marion Police. In certain cases liability under § 1983 may exist when one state actor fails to intervene to prevent another state actor from causing direct harm to a victim. *Yang v. Hardin*, 37 F.3d 282, 285 (7th Cir. 1994). Just such a case can exist when one law enforcement officer has reason to know "that any constitutional violation has been committed by another law enforcement official; *and* the officer had a realistic opportunity to intervene to prevent the harm from occurring." *Id.* Liability under this theory is certainly not limited to the context of a police officer's relationship with other officers in her department; but on the other hand the rule is not so broad as to place a responsibility on every government employee to intervene in the acts of all other government employees. In the instant case there appears no particular governmental connection between Rigsbee and the Marion Police. Appellant has not alleged that the Marion Police have any authority over teachers that they do not have over any other citizen of Marion or that they share any joint responsibility with school officials. To be sure, we are not today deciding a case where an employee of one government

entity failed to intervene to prevent harm by an employee of another entity where the two entities shared, in practice, some relationship. Against the background of this case, *Yang* does not apply.

As for the claim of municipal liability, a plaintiff must prove that the individual officers are liable on the underlying substantive claim in order to recover damages from a municipality under either a failure to train or failure to implement theory. *Tesch v. County of Green Lake*, 157 F.3d 465, 477 (7th Cir. 1998). Having determined that Chaunce did not suffer a constitutional violation from the inaction of Raymer or any other police officer in Marion, we must conclude that the City of Marion cannot be held liable for a failure to train or a failure to institute a policy.

III. Conclusion

As regrettable as the delayed reaction of Sergeant Raymer and the Marion Police Department may have been, it did not violate any constitutional rights of Chaunce Windle. That being the case the district court appropriately granted summary judgment in favor of Raymer and the City of Marion in this § 1983 suit. The judgment of the district court is AFFIRMED.

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA

[Filed Apr. 25, 2002]

Case No. 1:00-cv-468

JANE DOE,

Plaintiff,

v.

CITY OF MARION, INDIANA, a municipal corporation, by and through the CITY OF MARION, INDIANA POLICE DEPARTMENT and SERGEANT ROB RAYMER in his official and individual capacity,

Defendants.

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the court for a trial by jury. The issues have been tried and the jury has rendered its verdict.

[X] Decision by Court. This action came to trial, hearing or consideration before the Court. The issues have been tried, heard or considered and a decision has been rendered.

IT IS ORDERED AND ADJUDGED judgment is hereby entered for Defendants CITY OF MARION, INDIANA, a municipal corporation, by and through the CITY OF MARION, INDIANA POLICE DEPARTMENT and SERGEANT ROB RAYMER in his official and individual capacity and against Plaintiff Jane Doe.

Stephen R. Ludwig, Clerk

By: /s/ [Illegible]
Deputy Clerk

Equivalent Coupon Issue Yield: 2.42%

This document entered pursuant to Rules 79(a) and 58
of the Federal Rules of Civil Procedure on April 25, 2002

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF INDIANA
FORT WAYNE DIVISION

[Filed Apr. 23, 2002]

Case No. 1:00-CV-0468

JANE DOE [1]

Plaintiff,

v.

CITY OF MARION, INDIANA, a municipal corporation, by and through the CITY OF MARION, INDIANA POLICE DEPARTMENT and SERGEANT ROB RAYMER in his official and individual capacity

Defendants.

MEMORANDUM OF DECISION AND ORDER

Presently before the court are a host of motions including: Defendants' Motion for Summary Judgment filed on February 2, 2002; Plaintiff's Motion to Strike Defendants' Evidentiary Materials, Item #4, filed on March 1, 2002; Plaintiff's Second Motion to Strike Defendants' Evidentiary Materials, fled on March 27, 2002; and Defendant's Motion to Strike Plaintiff's Designation of Charles Braun as an expert witness, filed on March 18, 2002. All of these motions have been fully briefed and are ripe for consideration.

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[1] Because of the nature of the underlying events giving rise to this action, the plaintiff has been permitted to proceed using the name "Jane Doe" and certain portions of the record have been ordered sealed. See Docket #17, Order dated February l, 2002, granting in part and denying in part motion for leave to file under seal.

For the following reasons, Defendant's Motion for Summary Judgment will be GRANTED; Plaintiff's Motions to Strike and Defendants' Motion to Strike will all be DENIED as MOOT.

APPLICABLE STANDARD

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). However, Rule 56(c) is not a requirement that the moving party negate his opponent's claim. *Fitzpatrick v. Catholic Bishop of Chicago*, 916 F.2d 1254, 1256 (7th Cir. 1990). A scintilla of evidence in support of the non-moving party's position is not sufficient to successfully oppose summary judgment; "there must be evidence on which the jury could reasonably find for the plaintiff." *Id.* at 2512; *In Re Matter of Wildman*, 859 F.2d 553, 557 (7th Cir.1988); *Klein v. Ryan*, 847 F.2d 368, 374 (7th Cir.1988); *Valentine v. Joliet Township High School District No. 204*, 802 F.2d 981, 986 (7th Cir.1986). No genuine issue for trial exists "where the record as a whole could not lead a rational Crier of fact to find for the nonmoving party." *Juarez v. Ameritech Mobile Communications, Inc.*, 957 F.2d 317, 322 (7th Cir.1992) (quoting *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586,106 S.Ct. 1348,1356 (1986)).

Irrelevant or unnecessary facts do not preclude summary judgment even when they are in dispute because the issue of fact must be genuine. Fed. R. Civ. P. 56(c), (e). To establish a genuine issue of fact, the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts." *Matsushita*, 475 U.S. at 586,106 S.Ct. at 1356; *First National Bank of Cicero v. Lewco Securities Corp.*, 860 F.2d 1407,1411 (7th Cir.1988). The non-moving party must come forward with specific facts showing that

there is a genuine issue for trial. *Id.* A summary judgment determination is essentially an inquiry as to "whether the evidence presents a sufficient disagreement to require submission to a jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-52,106 S.Ct. at 2512.

FACTUAL BACKGROUND

This case arises out of an unfortunate series of events involving a then-minor child, Jane Doe ("Doe") and a middle school teacher, Carol Rigsbee ("Rigsbee"). For purposes of this action, the relevant timeline of events begins in September or early October 1997.[2] During this time, Defendant, Sergeant Rob Raymer ("Raymer") was informed by Marion police officer Larry Shaw ("Shaw") that Shaw and other officers had overheard, via a police scanner, sexually explicit cellular telephone conversations between two females. Shaw further informed Raymer that the conversations were between an unknown adult female and a younger female, known in the conversations by her first name only.

After learning of these telephone conversations, Raymer intercepted cellular telephone conversations four or five times over the next two months.[3] The content of the conversations caused him to believe that the adult female was a middle school teacher and that the younger female was a student.[4] Raymer became concerned that the young girl might be the

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[2] Plaintiff presents an extensive 47 page statement of facts most of which are irrelevant to the legal issues presented by Defendants' Motion for Summary Judgment. As a result, only those facts pertinent to the legal issues have been recited in this section.

[3] Apparently, the majority of these phone calls occurred during weekend nights.

[4] At the time he was listening to these conversations, Raymer did not know the age of the student and, according to his testimony, she could have been a nineteen year-old senior and not a minor child.

victim of molestation and brought the matter up to the other officers and Lieutenant Andrea Dunn during shift line-up.[5] The date of this line-up discussion is unclear in the record. According to Raymer, however, the line-up discussion occurred several days to a week before November 25, 1997. At the time he initiated the line-up discussion, Raymer knew Jane Doe's first name and that she was a student. Raymer did not, however, know the last name of Jane Doe.

During this line-up discussion, Gary Henderson ("Henderson"), a Marion police officer, recognized Jane Doe's first name because it was an uncommon name. He indicated to Raymer that he knew a middle school teacher, (hereafter, "Rich Doe") that had a fourteen or fifteen year old female daughter matching the first name of Jane Doe.[6]

Within a day or two of learning Rich Doe's name, Raymer obtained Rich Doe's telephone number. Shortly thereafter, Raymer overheard, again via scanner, another telephone conversation between Jane Doe and the adult female, later

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[5] Raymer stated that "line-up" takes place at the start of a shift and involves officer roll call and the assignment of particular work. (Raymer Dep. p. 30).

[6]During the line up discussion, Henderson recalled Lieutenant Dunn stating that there was nothing the department could do because the officers were illegally intercepting cellular telephone conversations. This response upset Henderson because he believed a crime was ongoing and that molestation is immoral. However, Henderson interpreted Dunn's statement as a directive from the department that nothing could be about the situation.

Dunn does not recall the line-up discussion in the same way as Henderson. Dunn testified that during the discussion the officers mentioned that they were listening to cellular traffic on their scanners and casually mentioned a lesbian conversation between two women that they overheard. According to Dunn, the officers wanted to know whether this interception was legal and what to do if they overheard criminal activity. (Dunn Deposition, pp. 29-31).

determined to be Rigsbee. While that telephone conversation was ongoing, Raymer dialed Rich Doe's phone number, waited until he heard, via the scanner, his cell phone ring on the house phone of Jane Doe, and hung up. At this point, Raymer believed that Jane Doe was the young person who had been part of the telephone conversations he overheard.[7]

On November 25, 1997, Raymer approached Kent Cocking ("Cocking"), a counselor at Tucker Middle School, to discuss what he knew of this situation with him. Cocking and Raymer then approached Rich Doe and informed him of their suspicions of a sexual relationship between Jane Doe and Rigsbee. Raymer, Rich Doe and Cocking then spoke with Mary Pahmeier ("Pahmeier"), Principal of Jones Middle School.[8] Raymer then spoke to Rigsbee who admitted molesting Jane Doe.

At some point shortly thereafter (the record is unclear as to the specific date), Raymer contacted the Prosecutor's Office and informed it of the above events. Subsequently, on December 1, Raymer discussed the above events in detail with Lieutenant Dunn and advised her that he had contacted the Prosecutor's Office and provided all of the information he had to them.

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[7] Doe claims that any person listening to the conversations between herself and Rigsbee would have known her identity well before Raymer claims he did. However, she has no specific facts to show that Raymer did know her full identity before the date Raymer says he did nor does she have any facts as to which conversations Raymer intercepted so as to show that he would have known her identity earlier. In any event, even if the court assumes that Raymer did know Doe's identity as early as October 1997, this fact does not change the legal analysis adopted herein.

[8] Rigsbee was employed at Jones Middle School.

On December 2,1997, Raymer authored an incident report wherein he described essentially the same events as related above. This was the first time he or any other officer had filed a written report of the ongoing events.[9]

Carol Rigsbee was ultimately prosecuted for child molestation and served jail time.

Pursuant to Indiana Code § 31-33-5-1, a person who has reason to believe that a child is a victim of child abuse is required to make a report to the appropriate authority. Indiana Code § 31-335-3 provides that such a report must be made to either (1) the local child protection service or (2) the local law enforcement agency. There is no rule or departmental regulation in the Marion City Police Departments book of Standard Operating Rules and Procedures or General Orders Manual which directs police officers about the reporting requirements under Indiana law. In addition, a number of officers testified in their depositions that they do not recall instances of specific training regarding child abuse/ molestation crimes.

Based upon the above facts, Jane Doe sued Sergeant Raymer individually and in his official capacity as well as the City of Marion ("the City"), pursuant to 42 U.S.C. § 1983, claiming that the Defendants violated her right to substantive due process under the Fourteenth Amendment by failing to intervene sooner to stop the ongoing molestation. Jane Doe also claims that the City failed to properly train its police officers on how to investigate child abuse crimes.

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[9] Raymer was eventually suspended for two days because, according to his supervisor, he should have filed a written police report as soon as he believed a molestation crime was occurring.

DISCUSSION

Section 1983 is not a source of substantive rights but instead provides "a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver*, 510 U.S. 266,114 S.Ct. 807, 811 (1994). To prevail on a claim under section 1983, plaintiff must therefore show "(1) the defendant deprived the plaintiff of a right secured by the Constitution and laws of the United States, and (2) the defendant acted under color of state law." *Reed v. City of Chicago*, 77 F.3d 1049,1051 (7th Cir. 1996); *see also, Parratt v. Taylor*, 451 U.S. 527, 535, 101 S.Ct. 1908, 1913 (1981); *Gomez v. Toledo*, 446 U.S. 635, 640,100 S.Ct. 1920, 1923 (1980). In their motion, Defendants focus on the first requirement, whether there exists a genuine issue of material fact that the defendants deprived the plaintiff of her Fourteenth Amendment right to substantive due process.

Suit may be brought against individual officers in either their official or individual capacity or both. Here, Doe brings suit against Raymer in both his individual and official capacities. The distinction is telling because where suit is brought against an individual in his official capacity it is really a claim against the municipality, *see Gossmeyer v. McDonald*,128 F.3d 481, 494 (7th Cir. 1997) and thus, Doe's claim against Raymer in his official capacity is another way of making a claim against the City. The court turns first to Doe's individual capacity claim against Raymer and then to Doe's allegations of municipal liability.

I. Substantive Due Process: Individual Capacity Claim Against Raymer

With respect to Raymer individually, Doe claims that Raymer's failure to act sooner to intervene and stop the molestation violated her substantive due process rights under the "state-created danger exception" which was developed from language in *DeShaney v. Winnebago County Depart-*

ment of Social Services, 489 U.S.189,109 S.Ct. 998,103 L.Ed.2d 249 (1989). The Seventh Circuit recently summarized the facts and holding of *DeShaney* in *Dykema v. Skoumal*, 261 F.3d 701, 704-705 (7th Cir. 2001):

> *DeShaney* held that the state had no constitutional duty to protect a child against his father's violent abuse. In *DeShaney*, there was strong evidence of child abuse in the home, and on one occasion the child required emergency hospital care. The county social services agency looked into the charge and the juvenile court as a result placed the child in the temporary custody of the hospital. A child protection team was assembled, ad hoc, which recommended certain measures to protect the child. The father voluntarily agreed to comply with the team's recommendations and the court returned the child to the father's custody. The caseworker made monthly visits for the next six months, each time noting suspicious injuries on the child and recording that none of the protective measures had been adopted. Calls from emergency room physicians also continued, the last one made in November 1983. The caseworker made two more visits but did nothing except to note that on both occasions she was told the boy was too ill to be seen. No other action was taken. In March 1984, the father beat the four-year-old boy so severely that he suffered permanent brain damage and was expected to spend the rest of his life institutionalized. The father was subsequently convicted of child abuse, but that was too late to benefit the boy.

Id. at 704-705 (internal citations omitted). Based upon the above facts, the Supreme Court concluded that:

> [O]ur cases have recognized that the Due Process Clauses generally confer no affirmative right to governmental aid, even where such aid may be necessary to secure life, liberty, or property interests of which the

> government itself may not deprive the individual. . . . If the Due Process Clause does not require the State to provide its citizens with particular protective services, it follows that the State cannot be held liable under the Clause for injuries that could have been averted had it chosen to provide them. As a general matter, then, we conclude that a State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause.

DeShaney, 489 U.S. at 196-197,109 S.Ct. 998.

In coming to the above conclusion, the Supreme Court left open the possibility that a constitutional violation might occur if the state were to create a danger that deprives an individual of Fourteenth Amendment rights. *See id.* at 201 (stating that even though the state may have been aware of the danger, "it played no part in their creation, nor did it do anything to render him any more vulnerable to them."). This theory has become known as the "state-created danger" exception and it is a recognized theory in this circuit, *see Dykema*, 261 F.3d at 704; *Reed v. Gardner*, 986 F.2d 1122, 1126 (7th Cir. 1993). Under the exception, liability arises where the state action "creates, or substantially contributes to the creation of a danger or renders citizens more vulnerable to a danger than they otherwise would have been." *Id.* (quoting *Reed*, 986 F.2d at 1126).

Defendants argue that there can be no liability under the state-created danger exception because the exception requires evidence of some affirmative act by the state actor that creates, heightens, or increases the danger to the Plaintiff. *See Reed*, 986 F.2d at 1 127 ("we do suggest that officers may be subject to suit under section 1983 if they knowingly and affirmatively create a dangerous situation for the public and fail to take reasonable preventative steps to diffuse that danger."); *Sargi v. Kent City Bd of Educ.*, 70 F.3d 907, 913 (6th Cir.1995) (liability under the state-created danger theory

must be predicated on the state's affirmative acts which work to plaintiff's detriment in terms of exposure to danger which plaintiff was not already exposed to); *Pinder v. Johnson*, 54 F.3d 1169,1176 n. *, 1177 (4th Cir.1995) ("All [cases recognizing liability outside the custodial context] involved some circumstance wherein the state took a much larger and more direct role in "creating" the danger itself. . . . In such instances, the state is not merely accused of a failure to act; it becomes much more akin to an actor itself directly causing harm to the injured party."); *D.R. v. Middle Bucks Area Vocational Technical School*, 972 F.2d 1364, 1374- 75 (3d Cir. 1992) ("[l]iability under the state-created danger theory is predicated upon the states' affirmative acts" and cases applying the theory find that the state "affirmatively acted to create the danger to the victims"); *Brown v. Grabowski*, 922 F.2d 1097,1116 (3d Cir.1991) (officer's failure to act does not subject him to liability)). Here, the Defendants contend, the only conduct alleged by Doe is an omission to act which did not expose the plaintiff to any additional risk of harm. Thus, Defendants argue that Doe has failed to establish a substantive due process violation under the theory of a state-created danger.

Doe appears to agree with the general principal that substantive due process requires some affirmative act by a state actor. In fact, she attempts to frame her response by using this terminology. For instance, she repeatedly states that the "affirmative act" in this case is the failure of Raymer and others to act. *See Response* p.10 ("Raymer failed to take the affirmative step required by Indiana law to immediately report the reasonable belief of child abuse and or neglect to the Department and/or to the Office of Family and Children"); Response, p. 11 ("Raymer and the City affirmatively abandoned the investigation. . ."). Whether the failure of the Defendants to act as alleged by Doe can be classified as an "affirmative act" by the state is an interesting question. Yet, the real question posed by the parties' arguments is whether

Raymer or the City used their authority to create a danger or render the plaintiff more vulnerable to a danger than she otherwise would have been. *See Monfils v. Taylor*, 165 F.3d 511 (7th Cir.1998) (a cause of action exists if plaintiffs allege "state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger [than] they otherwise would have been); *Morse v. Lower Merion School Dist*,132 F.3d 902, 915 (3d Cir. 1997) ("[T]he dispositive factor appears to be whether the state has in some way placed the plaintiff in a dangerous position that was foreseeable, and not whether the act was more appropriately characterized as an affirmative act or an omission."). This court's review of the evidence reveals that they did not.

Case law in this circuit and others is replete with situations where a state actor's failure to prevent, intervene, or otherwise take some action to alleviate a potential danger has been held not to be enough for liability under the state-created danger exception. In *Dykema*, a paid informant, who was shot and seriously wounded while working with a narcotics squad, brought a § 1983 action for damages against squad, squad members, and city claiming that the defendants placed him in a position of peril by using him as an informant. *Dykema*, 261 F.3d at 703. The Seventh Circuit rejected Dykema's claim and found that the state did not create any danger to Dykema by utilizing his services as a confidential informant because it had not promised to protect Dykema nor did Dykema seek the defendants' protection while working as an informant. *Id.* at 706-707. Rather, the court, after citing to two cases with distinguishable fact patterns,[10] stated "we have a factual situation which cannot be squeezed into any *DeShaney* exception, or into the exceptions which have grown out of *Deshaney*." *Id.* at 705.

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[10] The two cases referenced were the Seventh Circuit's decision in *Reed v. Gardner*, 986 F.2d 1 122 (7th Cir.1993) and *Monfils v. Taylor*, 165 F.3d 51 l, 513 (7th Cir.1998).

In *Morse v. Lower Merion School Dist.*,132 F.3d 902 (3d Cir.1997), a teacher was killed in a day care center located in a public high school. *Id.* at 904. The assailant entered the building through an unlocked entrance; he was later convicted and incarcerated in a psychiatric hospital. *Id.* In an action against the school district for creating the dangerous condition that led to the death, the court found that the plaintiff did not meet his burden of proving these defendants placed the victim in harm's way. *See id.* at 916. In another Third Circuit decision, *D.R. v. Middle Bucks Area Vocational Tech. Sch.*, 972 F.2d 1364 (3d Cir.1992) (en banc), cert. denied, 506 U.S.1079,113 S.Ct. 1045, 122 L.Ed.2d 354 (1993), two high school students filed a § 1983 claim alleging they were sexually molested by fellow students in the bathroom and darkroom of their graphic arts class room.. According to their complaint, the high school's failure to adequately supervise the class or investigate the misconduct created the dangerous situation that resulted in their injuries. The Third Circuit affirmed the district court's dismissal of the claim holding that the school was not liable because the plaintiffs did not demonstrate that the state placed the plaintiffs in danger, increased their risk of harm, or made them more vulnerable to danger.

Likewise, in *Mitchell v. Duval County Sch. Bd.* ,107 F.3d 837 (11th Cir.1997), the court of appeals rejected a state-created danger claim wherein the decedent, Richard Mitchell, was a fourteen year-old student who was shot and killed one evening while waiting for a ride home from a school function. Mitchell had attempted to telephone his father from inside the school administration office, but was denied entry. Instead he used an outside pay phone, and, while waiting for his father on a driveway adjacent to the school, was shot and killed during a robbery attempt. The court of appeals rejected plaintiff's state-created danger theory on the grounds that he failed to "show that the state affirmatively placed decedent in a position of danger." *Id.* at 839. According to the court,

nothing the school did "required [decedent] to wait where he did." Indeed, the boy could have waited inside the administration building or immediately outside, rather than waiting "a considerable distance away on the edge of the school's parking lot." *Id. See also, Estate of Burke v. Mahanoy City et al.*, 40 F.Supp.2d 274 (E.D.Pa.1999), aff'd without opinion, 213 F.3d 628 (3d Cir.2000) (finding no statecreated danger where officers "simply let the events unfold as they stood idly bye [sic]").

Here, there is nothing in the record which suggests that the Defendants created the situation between Rigsbee and the plaintiff. Indeed, by plaintiff's own admission the relationship between herself and Rigsbee was abusive well before police heard the suspicious cellular telephone conversations between the two. Thus, Raymer's acts or omissions did not increase the risk of injury beyond what it would have been had Raymer not intervened at all.

Nevertheless, Doe cites to the Seventh Circuit's decisions in *Reed* and *Monfils* to support her contention that the failure to act by Raymer and others falls within the "state-created danger" exception. However, as the Seventh Circuit noted in *Dykema*, the holdings in these cases are based upon "unique factual situations" and it is clear that these types of circumstances are not present in this case. *Dykema*, 261 F.3d at 705.

In *Reed*, for instance, the court, in a close case, found that the defendant police officers increased the risk of a drunk driving accident by removing a sober driver from the car and leaving a drunk passenger to drive the car home, id. at 1125, but if the officers had arrested an inebriated driver and left another inebriated passenger to drive the car, the risk of an accident would not have increased because the drunk driving risk would have remained the same. *Id.* Thus, in *Reed* the court found that the act of leaving the drunk passenger with the means to drive home was an "affirmative act" for purposes of the state-created danger exception.

Similarly, in *Monfils*, Monfils made an anonymous telephone call to the police informing them that another employee was planning to steal company property. Monfils required anonymity because he knew that the other employee had a reputation for violence. Ultimately, the employee was caught while attempting to steal company property and vowed to discover the informant's identity. Monfils then contacted the defendants trying to prevent the release of the recorded telephone call he had made to the police. Monfils was assured that the tape would not be released but one officer found the tape and turned it over to the employee. The employee recognized Monfils voice on the tape and murdered him several hours later. The Seventh Circuit concluded that the false assurances of protection by the police, qualified as an affirmative act for purposes of a state-created danger claim. *Monfils*,165 F.3d at 516.

Here, the Defendants, and specifically Raymer, made no false promise of protection to Doe (and she never requested protection from the police), nor did the Defendants or Raymer do anything to create or exacerbate the situation between Rigsbee and Doe.[11] Raymer simply stood by and permitted the status quo to continue until he had information from which he could identify Jane Doe. In the course of his investigation, Raymer did not, for instance, knowingly place Doe in a position where Rigsbee would have additional access and opportunity to continue the molestation. In fact, the police had no contact whatsoever with Doe or Rigsbee

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[11] Doe makes much of the fact that Raymer did not report what he did know to the Division of Child and Family Services as required by Indiana statute. However, the statute in question requires reporting to either a local law enforcement agency or the local child protection service. Raymer, by virtue of the fact that he was a member of law enforcement, does not appear to have had any additional statutory obligation to report what he knew to the local child protection services. Thus, the court puts little weight in this argument.

until November 25. Any access Rigsbee had to Doe prior to that time occurred without any police intervention or aid. Accordingly, the court cannot conclude that Raymer imperiled Doe by failing to intervene sooner. Therefore, Defendants' Motion for summary judgment is GRANTED as to Raymer's in his individual capacity.[12]

II. Municipal Liability

As noted above, Doe also brings an official capacity claim against Raymer and, in addition, she has sued the City. To succeed on a claim against a municipality, the plaintiff must show that the municipality maintained an express policy of depriving its citizens of their constitutional rights, *see, McTeague v. City of Chicago*, 60 F.3d 381, 382 (7th Cir.1995), that its practice of depriving citizens of their constitutional rights, though not authorized or not written, was so widespread so as to have the force of law, *Board of County Comm 'n of Bryan v. Brown*, 117 S. Ct.13 82,1388 (1997), or that the individual in question was a person with final policymaking authority who made a deliberate choice to either deprive plaintiff of some constitutional right, *see, West v. Waymire*, 114 F.3d 646, 651-52 (7th Cir) *cert. denied*, 118 S.Ct. 337 (1997), or acquiesced in such a deprivation turning a "blind eye for fear of what [he] might see, *Lanigan v. Village of East Hazel Crest*,110 F.3d 467, 477 (7th Cir.1997).

In *Canton v. Harris*, 489 U.S. 378 (1989), the Supreme Court indicated that municipal liability could be triggered by evidence of a single violation of federal rights, accompanied by a showing that the municipality has failed to train its employees to handle recurring situations presenting an obvious potential for such a violation, id., at 390, and n.10. Indeed, an allegation of failure to train may create § 1983 liability where the failure to train "amounts to deliberate

[12] Because the court concludes in this fashion, it need not address Raymer's secondary argument that he is entitled to qualified immunity.

indifference to the rights of persons with whom those employees are likely to come into contact." *City of Canton*, 489 U.S. at 388-89,109 S.Ct. 1197). To establish liability, the inadequate training "must be closely related to the ultimate injury," *Id.* 489 U.S. at 391, 109 S.Ct. 1197, such that constitutional violation would have been avoided if the City had properly trained the officers.

Here, plaintiff claims that the City failed to train its police officers to effectively handle child abuse cases such as the one that occurred here and that such failure to train led to a constitutional violation in this case. In support of this claim, Doe points to the deposition testimony of several officers, all of whom indicate that they do not recall receiving any training relating to child abuse cases or any training with respect to Indiana's child abuse reporting statute. She has also provided expert testimony from Charles Braun wherein he opines about the inadequacy of training, the foreseeability and need for such training and the implications of receiving inadequate training on persons with whom the police come in contact. Defendants move to strike the testimony of Braun and rebut Doe's evidence with Defendants' Exhibit 4 (subject to two motions to strike by Plaintiff) which purports to be provisions from a Field Training Officer Program Manual. The Manual is submitted by Defendants to demonstrate that officers are, contrary to their testimony to the contrary, routinely trained in handling child abuse cases.

This court needn't decide any of the motions to strike because at this phase of the litigation, they are elementary. As stated above, Doe must demonstrate that the constitutional violation alleged would have been avoided with proper or adequate training. Because this court has already found as a matter of law that no constitutional violation occurred, the lack of any underlying constitutional violations likewise dooms Doe's municipal liability claim based upon a failure to train. *Tesch v. County of Green Lake*, 157 F.3d 465, 477

(7th Cir. 1998) ("A failure to train theory or a failure to institute a municipal policy theory requires a finding that the individual officers are liable on the underlying substantive claim."); *Caricofe v. Mayor and City Council of Ocean City, Maryland*, 2002 WL 482563, *5 (4th Cir.(Md.)) ("Because the police officers did not violate Caricofe's constitutional rights, the other defendants may not be held liable for failing to train or supervise those officers."); *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (holding that a municipality cannot be held liable for an official policy or custom if it has been determined that the individual defendants did not violate the plaintiff's constitutional rights); *Young v. City of Mount Ranier*, 238 F.3d 567, 579 (4th Cir.2001) ("The law is quite clear in this circuit that a section 1983 failure-to-train claim cannot be maintained against a governmental employer in a case where there is no underlying constitutional violation by the employee."); *Grayson v. Peed*, 195 F.3d 692, 697 (4th Cir.1999) ("As there are no underlying constitutional violations by any individual, there can be no municipal liability."); *Trigalet v. City of Tulsa*, 239 F.3d 1150,1156 (10th Cir.2001) (concluding that a municipality may be held liable only if the conduct of its employees directly caused a violation of a plaintiff's constitutional rights*); Schulz v. Long*, 44 F.3d 643, 650 (8th Cir.1995) ("It is the law in this circuit . . . that a municipality may not be held liable on a failure to train theory unless an underlying Constitutional violation is located."). Accordingly, Doe's claim for municipal liability based upon its failure to train officers regarding child abuse cases fails. Defendants' Motion for Summary Judgment is GRANTED as to this claim.[13]

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[13] To the extent Doe is attempting to assert that Lt. Dunn is a policymaker for the City and that she made a deliberate choice to deprive plaintiff of some constitutional right, this claim clearly fails. Doe has not presented any evidence, other than some speculative testimony, that Dunn is, in fact, a policymaker as opposed to an individual who enforces City

CONCLUSION

In sum, Doe has not raised a genuine issue of material fact as to any violation of her clearly established Constitutional rights to support a § 1983 claim nor has she demonstrated that the failure of the City to train its officers resulted in a Constitutional violation. Accordingly, the Defendants' Motion for Summary Judgment is GRANTED; Plaintiff's Motions to Strike (Docket #21 and Docket #31) and Defendants' Motion to Strike (Docket #26) are DENIED as MOOT. The Clerk is directed to enter judgment in favor of the Defendants.

Entered: April 23, 2002

/s/ William C. Lee, Chief Judge
WILLIAM C. LEE
United States District Court

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policy made by others. Thus, she has not raised a genuine issue of material fact that Dunn is a policymaker for purposes of municipal liability.

(2)

Supreme Court, U.S.
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No. 03-21

In The
Supreme Court of the United States

CHAUNCE WINDLE,

Petitioner,

vs.

CITY OF MARION, INDIANA, a municipal corporation, by and through the City of Marion and SERGEANT ROBERT RAYMER,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' CITY OF MARION, INDIANA AND SERGEANT ROBERT RAYMER'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I.

QUESTIONS PRESENTED FOR REVIEW

Respondents, the City of Marion, Indiana, a municipal corporation, by and through the City of Marion ("the City of Marion") and Sergeant Robert Raymer ("Sgt. Raymer"), disagree with the statement of the questions presented for review in Chaunce Windle's ("Windle") Petition for Writ of Certiorari. Instead, the questions presented for review are these:

1. Whether the Seventh Circuit Court of Appeals correctly affirmed summary judgment in favor of Sgt. Raymer on Windle's failure to protect claim by applying the general rule articulated by this Court in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 197, 109 S.Ct. 998, 1004, 103 L.Ed.2d 243 (1989), that a "state's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause," where the evidence is uncontroverted that Sgt. Ramer took no affirmative action to place Windle in a position of danger or increase the risk of danger presented to Windle at the hands of her abuser, Carol Rigsbee ("Rigsbee").

2. Whether the Seventh Circuit Court of Appeals correctly affirmed summary judgment in favor of the City of Marion on Windle's municipal liability claims where there was no underlying constitutional violation by Sgt. Raymer and the "shocks the conscience" substantive due process theory from *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) is inapplicable to failure to protect cases.

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II.

THE PETITION MISREPRESENTS THE UNDERLYING FACTS

The respondents disagree with the Statement of the Case presented by Windle as it grossly misrepresents and distorts the underlying facts in an effort to persuade this Court to grant certiorari. The most glaring misstatements woven throughout the Petition are the repeated assertions that "the defendants" failed to act to protect Windle from harm and prevented unidentified others from intervening on her behalf to extricate her from the situation.

Windle ignores, and apparently wants this Court to ignore, that the only named individual defendant is Sgt. Raymer. As Sgt. Raymer is the only individual defendant, this Court's sole focus should be upon his conduct. Whether the Seventh Circuit Court of Appeals correctly applied the general rule of *DeShaney v. Winnebego County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 243 (1989), that government actors are not liable under 42 U.S.C. §1983 for simply failing to protect a citizen from private acts of violence, lives or dies based exclusively upon what Sgt. Raymer did or did not do. As there are no other individually-named defendants, anything other officers did or did not do is irrelevant and cannot be considered in addressing the merits, or lack thereof, of the Petition for Writ of Certiorari. The facts of this case, as accurately stated by both the District Court and the Seventh Circuit Court of Appeals, plainly demonstrate that Windle failed to point to a single affirmative act on Sgt. Raymer's part that created a danger or enhanced the danger Windle was already admittedly in.

Second, Windle misrepresents the underlying facts by repeatedly asserting that Sgt. Raymer and other officers,

who are not named defendants in this case, engaged in affirmative conduct or misconduct, choosing to not characterize the conduct as failure to act or inaction, for which there is clearly no constitutional claim. This semantic trickery is unavailing.

Neither the District Court nor the Seventh Circuit fell into the trap Windle attempted to set. The District Court made the following observations in rejecting Windle's efforts:

> Doe appears to agree with the general principal that substantive due process requires some affirmative act by a state actor. In fact, she attempts to frame her response by using this terminology. For instance, she repeatedly states that the "affirmative act" in this case is the failure of Raymer and others to act . . . Whether the failure of the Defendants to act as alleged by Doe can be classified as an "affirmative act" by the state is an interesting question. *Yet, the real question posed by the parties' arguments is whether Raymer or the City used their authority to create a danger or render the plaintiff more vulnerable to a danger than she otherwise would have been.*
>
> * * *
>
> *Here, there is nothing in the record which suggests that the Defendants created the situation between Rigsbee and the plaintiff.* Indeed, by plaintiff's own admission the relationship between herself and Rigsbee was abusive well before police heard the suspicious cellular telephone conversations between the two. *Thus, Raymer's acts or omissions did not increase the risk of injury beyond what it would have been had Raymer not intervened at all. Doe v. City of Marion*, 196

F.Supp.2d 750, 756-758 (N.D.Ind. 2002) (Emphasis added).

The Seventh Circuit Court of Appeals also soundly rejected Windle's efforts to articulate an affirmative "failure to act" claim.

> . . . Appellant attempts to show that Raymer took an affirmative action, even though he plainly did not. She characterizes Raymer's inaction as an affirmative choice, using phrases like "affirmatively choosing to stand idle" and "affirmatively chose not to take action" throughout her brief. We find this line of argument lacking and not in accord with our understanding of "taking an action affirmatively."
>
> *Even if one were to construe the conduct of the officers as some sort of affirmative action, we must then ask what new danger would have otherwise befallen the victim.* If Raymer, under Appellant's theory, had not taken the so-called affirmative action of doing nothing and had done something, we have no way of knowing what would have occurred. Indeed, the police might have failed at protecting Chaunce. We therefore have no assurance that the danger would not have existed in the absence of the so-called affirmative action of doing nothing.
>
> In focusing exclusively on whether the police acted affirmatively, *Appellant fails to grasp that she has to establish that the police failed to protect her from a danger* ***they created or made worse****. She confuses the inert failure to protect with the proactive creation or exacerbation of danger. In this case the police did nothing to create a danger, nor did they do anything to make worse any danger Chaunce already faced . . . .*

Windle v. City of Marion, 321 F.3d 658, 661-662 (7th Cir. 2003) (Emphasis added).

To further skew the facts, Windle argues on several occasions that Sgt. Raymer informed his superior officer, Lieutenant Alter-Dunn ("Lt. Dunn"), that he reported the abuse to the local prosecutor when he had in fact not yet done so. This is a red herring for several reasons. First, Sgt. Raymer's incident report is dated December 2, 1997, written approximately one week after Rigsbee admitted her molestation of Windle on November 25, 1997. As Sgt. Raymer's report was written after the alleged abuse ceased, it cannot be utilized by Windle to support her affirmative conduct claim. Moreover, Windle fails to explain how not reporting the alleged abuse to the prosecutor, if this is in fact what Sgt. Raymer did, amounts to affirmative conduct which placed Windle at an increased risk of harm, or amounts to conduct which prevented other officers from intervening on Windle's behalf. Again, the timing of the incident report is *after* the abuse ceased.

Windle also states that Lt. Dunn allegedly dissuaded other officers from intervening by telling a subordinate officer "there was nothing they could do because they had obtained the information by illegal intercept. Her words were viewed as a directive not to intervene." (Petition for Writ of Certiorari at p. 3). Officer Gary Henderson, who is not a party to this lawsuit, testified in his deposition that he was concerned about the conversations he overheard between Windle and Rigsbee and was upset when told that there was nothing that could be done about the situation. No matter how Windle attempts to twist the underlying facts, this testimony does not demonstrate affirmative conduct on the part of Sgt. Raymer which enhanced the danger to Windle. Moreover, the Seventh Circuit Court of

Appeals properly rejected Windle's argument that officers were dissuaded from protecting her, noting that this argument was mentioned only in passing in Windle's Reply Brief and was not pursued by her in the Court below. *Windle*, 321 F.3d at 662, n.3.

In addition, Windle ignores the fact that even if Lt. Dunn made comments to a subordinate about not doing anything to address the situation, she is not a named defendant in this case and was not a final policymaker for the City of Marion. Indeed, the District Court held that Windle failed to present any evidence that Lt. Dunn was "a policymaker as opposed to an individual who enforces City policy made by others," and therefore Windle failed to raise any genuine issue of material fact as to Lt. Dunn's status for purposes of municipal liability. 196 F.Supp.2d at 760.

III.

REASONS FOR DENYING THE WRIT

A. The Decision Below Is Not In Conflict With The Decisions Of Other Circuits

In *DeShaney*, *supra*, the Supreme Court held that the State has no constitutional duty to protect a child against abuse. 489 U.S. at 202, 109 S.Ct. at 1007. "[N]othing in the language of the Due Process Clause itself requires the State to protect the life, liberty, and property of its citizens against invasion by private actors." *Id.* at 195, 109 S.Ct. at 1003. Rather, the purpose of the Due Process Clause is to protect people from the State, not to require the State to protect individuals from each other. *Id.* at 196, 109 S.Ct. at 1003. The Supreme Court emphasized that the Due Process Clause is "phrased as a limitation on the State's

power to act, not as a guarantee of certain minimal levels of safety and security." 489 U.S. at 195, 109 S.Ct. at 1003.

The *DeShaney* Court explained the facts of the case as "undeniably tragic." *Id.* at 191, 109 S.Ct. at 1001. The Winnebago County Department of Social Services received numerous reports that a four-year-old child, Joshua DeShaney, was being abused by his father. The abuse continued and local officials even personally observed the injuries inflicted upon Joshua by the father. They knew firsthand of the threat to the child's safety, yet failed to remove him from the father's custody or take other measures to protect him from abuse. The father beat Joshua so severely that he was left profoundly retarded for life. Joshua and his mother sued state and local officials, alleging a deprivation of the child's liberty without substantive due process by failing to intervene to protect the child from the father's violence and abuse.

While expressing its natural sympathy for Joshua's plight, the Supreme Court held that there was no §1983 liability under the circumstances. The Court wrote that a "State's failure to protect an individual against private violence simply does not constitute a violation of the Due Process Clause." *Id.* at 197, 109 S.Ct. at 1004. Simply knowing about a person's precarious situation vis-à-vis another private party does not invoke any obligation on the part of the state actor to come to the person's aid.

In dicta, the *DeShaney* Court suggested a conceivable exception to the general rule of non-liability if the State actor plays a role in creation of the danger. In a single sentence, which is nothing more than a passing reference, the Court wrote: "While the State may have been aware of the dangers that Joshua faced in the free world, it played

no part in their creation, nor did it do anything to render him any more vulnerable to them." *Id.* at 201, 109 S.Ct. at 1006.

Although state and local officials were well aware of the abuse that Joshua was suffering at the hands of his father, any creation of danger exception afforded no relief as the *DeShaney* Court held that the officials' conduct in standing by and doing nothing did not affirmatively create a danger or render Joshua more vulnerable:

> Judges and lawyers, like other humans, are moved by natural sympathy in a case like this to find a way for Joshua and his mother to receive compensation for the grievous harm inflicted upon them. *But before yielding to that impulse, it is well to remember once again that the harm was inflicted not by the State of Wisconsin, but by Joshua's father. The most that can be said of the state functionaries in this case is that they stood by and did nothing when suspicious circumstances dictated a more active role for them. Id.* at 202-03, 109 S.Ct. at 1007. (Emphasis added).

Relying upon the vague "creation of danger" dicta in *DeShaney*, Circuit Courts have created a narrow limited exception to the general rule of non-liability for failure to act articulated in *DeShaney*. This narrow exception, referred to as the "state-created danger exception," provides that the state may be liable for failing to protect a person from harm by a private individual if the State itself affirmatively creates or enhances the risk of harm.

After rejecting Windle's efforts to construe the record as showing affirmative conduct on Sgt. Raymer's part, rather than mere inaction, the Seventh Circuit Court of Appeals held that the facts of the case were "indistinguishable" from

DeShaney and therefore applied *DeShaney's* guiding principle of no constitutional liability for failure to protect Windle from molestation by Rigsbee. 321 F.3d at 662. The Court concluded that there was no evidence that Sgt. Raymer's failure to intervene earlier proactively created or exacerbated Windle's danger at the hands of her abuser. *Id.* The Court wrote as follows:

> This case is indistinguishable from *DeShaney* where the Supreme Court concluded that no constitutional violation had occurred when State actors who may have been aware that a child was being abused by his father did nothing to protect the child. 321 F.3d at 662.

The Seventh Circuit Court of Appeals' conclusion echoes the sentiments of the District Court that "there is nothing in the record which suggests that the Defendants created a situation between Rigsbee and the plaintiff." 196 F.Supp.2d at 758. As the relationship between Windle and Rigsbee was abusive long before any officer overheard a single telephone conversation, the District Court concluded that "Raymer's acts or omissions did not increase the risk of injury beyond what it would have been had Raymer not intervened at all." *Id.* The District Court's conclusion is fully supported by the evidence:

> Here, the Defendants, and specifically Raymer, made no false promise of protection to Doe (and she never requested protection from the police), nor did the Defendants or Raymer do anything to create or exacerbate the situation between Rigsbee and Doe. Raymer simply stood by and permitted the status quo to continue until he had information from which he could identify Jane Doe. In the course of his investigation, Raymer did not, for instance, knowingly place Doe in a position

> where Rigsbee would have additional access or opportunity to continue the molestation. In fact, the police had no contact whatsoever with Doe or Rigsbee until November 25. Any access Rigsbee had to Doe prior to the time occurred without any police intervention or aid. Accordingly, the court cannot conclude that Raymer imperiled Doe by failing to intervene sooner. 196 F.Supp. at 758-59.

Despite an absolutely correct application of *DeShaney* by both the Seventh Circuit Court of Appeals and the District Court, Windle attempts to entice this Court to accept her case by arguing that the Seventh Circuit's formulation of the state-created danger exception is in conflict with the decisions of other Circuits, namely, the Third, Fifth, Sixth and Tenth Circuits. To be blunt, this is a false proposition. While various Circuits articulate slightly different tests to determine whether the state created a danger for which it may be liable under 42 U.S.C. §1983, common threads run through each test. The Circuits uniformly agree that *DeShaney* clearly establishes that the failure of a state to protect citizens from private violence does not give rise to a due process claim. However, most Circuits which have addressed the issue also recognize a very limited exception to this general rule exists where the state affirmatively places an individual in a position of danger, makes the individual more vulnerable at the hands of the third party, or increases the risk that the individual might be exposed to private acts of violence. Those Courts acknowledging this narrow exception require that the official act affirmatively as opposed to inaction or refusing to act. This stringent requirement arises from *DeShaney's* admonition that the Due Process Clause does not require the government to protect citizens from other

citizens and therefore the government cannot be held liable for failing to protect an individual from private violence.

Windle conveniently ignores that **all** Circuits agree that the state-created danger exception requires affirmative conduct on the part of government actors. *See e.g., Sargi v. Kent City Board of Education*, 70 F.3d 907, 913 (6th Cir. 1995) (liability under the state-created danger theory must be predicated on the state's affirmative acts which work to plaintiff's detriment in terms of exposure to danger to which plaintiff was not already exposed); *Pinder v. Johnson*, 54 F.3d 1169, 1176 (4th Cir. 1995), *cert. denied*, 516 U.S. 994, 116 S.Ct. 530, 133 L.Ed.2d 436 (1995) (cases which recognize liability "involved some circumstance wherein the state took a much larger and more direct role in 'creating' the danger itself. . . . In such instances, the state is not merely accused of a failure to act; it becomes much more akin to an actor itself directly causing harm to the injured party."); *Reed v. Gardner*, 986 F.2d 1122, 1126 (7th Cir. 1993), *cert. denied*, 510 U.S. 947, 114 S.Ct. 389, 126 L.Ed.2d 337 (1993) (explaining that a plaintiff "may state claims for civil rights violations if they allege state action that creates, or substantially contributes to the creation of, a danger or renders citizens more vulnerable to a danger tha[n] they otherwise would have been"); *Gregory v. City of Rogers*, 974 F.2d 1006, 1010 (8th Cir. 1992) (en banc), *cert. denied*, 507 U.S. 913, 113 S.Ct. 1265, 122 L.Ed.2d 661 (1993) ("the Due Process Clause imposes a duty on state actors to protect or care for citizens . . . when the state affirmatively places a particular individual in a position of danger the individual would not otherwise have faced."); *L.W. Grubbs v. Grubbs*, 974 F.2d 119, 121 (9th Cir. 1992), *cert. denied*, 508 U.S. 951, 113

S.Ct. 2442, 124 L.Ed.2d 660 (1993) ("the 'danger creation' basis for a claim . . . involves affirmative conduct on the part of the state in placing the plaintiff in danger."); *D.R. v. Middle Bucks Area of Vocational Technical School*, 972 F.2d 1364, 1374-75 (3rd Cir. 1992), *cert. denied*, 506 U.S. 1079, 113 S.Ct. 1045, 122 L.Ed.2d 354 (1993) ("liability under the state-created danger theory is predicated upon the states' affirmative acts" and cases applying the theory find that the state "affirmatively acted to create the danger to the victims"); *McComb v. Wambaugh*, 934 F.2d 474, 483 (3rd Cir. 1991) (holding that *DeShaney* prevented recovery because local social workers had not created the danger of private abuse).

Windle relies upon *Jones v. Union County*, 296 F.3d 417 (6th Cir. 2002) which involved the question of whether an officer's failure to serve an ex parte order of protection upon an ex-husband created or increased the danger posed to the plaintiff by her ex-husband. There was evidence that the Sheriff's Department had actual knowledge of domestic problems and violence between the individuals. Despite this knowledge, the Court found *DeShaney* controlling and held that as there was no factual support for the claim that the officers created or enhanced a danger to the ex-wife by failing to serve the order in a timely manner, she could not recover under the state-created danger exception.

Part of the Sixth Circuit's test includes demonstration by the plaintiff that he or she faced a "special danger" by virtue of the state's conduct, rather than a risk or danger to which the public at large is exposed. 296 F.3d at 430. Windle argues that had the Seventh Circuit considered this particular element, the record supports the conclusion that she was placed at a specific risk, rather than a risk to

the public at large. However, the record does not support this argument. While children are unfortunately at risk of being abused by third parties, there was no affirmative conduct on the part of Sgt. Raymer which created a particular danger to Windle not shared by the juvenile public at large. Windle's result would not be different under the Sixth Circuit test.

Windle also cites *Currier v. Doran*, 242 F.3d 905, 918 (10th Cir. 2001), *cert. denied*, 534 U.S. 1019, 122 S.Ct. 543, 151 L.Ed.2d 421 (2001), wherein the Court articulated a six-part test to determine if a defendant created a special danger to support liability under the state-created danger exception. The Tenth Circuit test is also of no benefit to Windle as she once again cannot satisfy the crucial element: that Sgt. Raymer either created the danger or increased the danger in some way. Despite her attempts to construe the record to the contrary, there simply is no evidence that Sgt. Raymer took any affirmative action which placed Windle in harm's way at the hands of her abuser, Rigsbee.

The Tenth Circuit's formulation also requires Windle to demonstrate a degree of outrageousness and a magnitude of potential harm that is truly conscience shocking, which requires, at the very least, a high level of outrageousness. *Uhlrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995), *cert. denied*, 516 U.S. 1118, 116 S.Ct. 924, 133 L.Ed.2d 853 (1996). The facts of this case fall far short of satisfying this stringent standard.

Windle also ignores the Tenth Circuit's admonition that "if the danger to the plaintiff existed prior to the State's intervention [or lack thereof], then even if the State

put the plaintiff back in that same danger, the State would not be liable because it could not have created a danger that already existed." *Armijo v. Wagon Mound Public Schools*, 159 F.3d 1253, 1263 (10th Cir. 1998). Sgt. Raymer did not create or exacerbate any danger to Windle because she was in "no worse position than [she] would have been had [defendants] not acted at all." *DeShaney*, 489 U.S. at 201, 109 S.Ct. at 1006.

Moreover, the conduct at issue in *Currier* demonstrates the distinction between the present case, which involves a failure to protect, from the facts of *Currier*, where there was affirmative conduct undertaken which specifically placed a child at risk of harm. Anthony Juarez was scalded to death with boiling water by his father. Christopher Vargas, the child's father, had custody of his son. Tom Doran, a social worker, was responsible for removing the child from his mother's custody and placing him in his father's custody. Once the child was in Vargas' custody, Doran made visits to the home and noticed bruises on the child and was also informed by the child's guardian that Vargas and his fiancée were physically abusing the child. Doran did not investigate the bruises or the information about physical abuse. On three occasions during the late summer of 1993, the child's mother made allegations that the father and his girlfriend were abusing Anthony which included a specific accusation that the child was dunked in a bathtub full of water as punishment. Doran did not investigate the allegations. On October 19, 1993, Doran was responsible for the Children's Court's decision to grant Vargas legal custody, thereby placing the child in Vargas' home and removing him from his mother's home. Several months later, Vargas poured boiling water on his son, which ultimately led to his death.

The Court concluded that the plaintiffs alleged sufficient facts to support a claim under the state-created danger exception, relying heavily upon Doran's affirmative conduct in recommending that Vargas be given legal custody of the child, which conduct thereby placed the child at an obvious risk of harm at the hands of his father. 242 F.3d at 920.

Here, there is no such similar affirmative conduct by Sgt. Raymer that placed Windle at an obvious risk of serious and immediate harm at the hand of her abuser. In fact, Sgt. Raymer never had any direct contact with Windle or her abuser at any time until he confronted both and ended the abuse. Thus, the Tenth Circuit's articulation of the state-created danger test does not assist Windle. The result remains the same.

Windle also cites *Morin v. Moore*, 309 F.3d 316 (5th Cir. 2002), wherein the Court applied a two-prong test to determine whether a plaintiff falls within the narrow state-created danger exception: "(1) the state actors created or increased the danger to the plaintiff and (2) the state actors acted with deliberate indifference." 309 F.3d at 322. However, Windle ignores the significant hurdles to establish deliberate indifference under this standard. In *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002) (en banc), *cert. denied*, ___ U.S. ___, 123 S.Ct. 1355, 155 L.Ed.2d 196 (2003), the Court held that to establish deliberate indifference the state actor must have knowledge of a risk to the victim's health and safety and disregard that risk for his conduct to rise to the level of deliberate indifference:

> To establish deliberate indifference, a state actor must know of and disregard an excessive risk to the [victim's] health and safety. The state actor's

> actual knowledge is critical to the inquiry. A state actor's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, does not rise to the level of deliberate indifference. 305 F.3d at 326.

Windle argues that the Fifth Circuit's test differs from that of the Seventh Circuit in that the Seventh Circuit does not consider whether the state employee acted with deliberate indifference. However, under the deliberate indifference test articulated by the Fifth Circuit, Windle's claim fairs no better. The most that can be said is that Sgt. Raymer may not have perceived the actual risk to Windle. However, as the *McClendon* decision makes clear, this does not rise to the level of deliberate indifference.

Windle also cites *Schieber v. City of Philadelphia*, 320 F.3d 409 (3rd Cir. 2003) and *Estate Smith v. Marasco*, 318 F.3d 497 (3rd Cir. 2003) wherein the Third Circuit Court of Appeals adopted a four-part test for a state-created danger claim:

> (1) the harm ultimately caused was foreseeable and fairly direct; (2) the state actor acted in willful disregard for the safety of the plaintiff; (3) there existed some relationship between the state and the plaintiff; [and] (4) the state actors used their authority to create an opportunity that otherwise would not have existed for the third party's crime to occur.

Windle latches on to the foreseeability element, arguing that had the Seventh Circuit considered this prong, she would have prevailed. Not so. Even if the harm to Windle was foreseeable, Sgt. Raymer had no relationship to her and nothing he did created or enhanced the

danger to Windle. Thus, the result would be the same in the Third Circuit as well

Although the Circuit Courts of Appeal do not employ identical standards for determining when the state-created danger exception applies, any minor distinctions do not warrant a grant of certiorari in this case. *DeShaney's* general rule applies with full force to the facts of this case, facts which plainly demonstrate nothing more than inaction by Sgt. Raymer. Regardless of which test or factors are considered, the result in this case is the same. Liability under the state-created danger theory is predicated upon affirmative acts by the state which either create a danger or increase the risk of exposure to danger. There is no affirmative conduct on the part of Sgt. Raymer which either placed Windle in a position of danger or exacerbated the situation, as correctly found by the Seventh Circuit Court of Appeals and the District Court. Mere inaction or failure to protect an individual from private acts of violence does not create liability under the Fourteenth Amendment. The factual scenario presented by this case simply does not rise to the level of that rare and exceptional circumstance where the narrow state-created danger exception applies.

B. The "Shocks The Conscience" Standard Is Inapplicable To A Failure To Protect Claim

Having determined that Windle "did not suffer a constitutional violation from the inaction of Raymer or any other police officer in Marion," the Seventh Circuit affirmed summary judgment on the failure to train claim asserted against the City of Marion as there was no underlying constitutional violation by Sgt. Raymer. 321

F.3d at 663. This was a correct result. In *City of Los Angeles v. Heller*, 475 U.S. 796, 799, 106 S.Ct. 1571, 1573, 89 L.Ed.2d 806 (1986), this Court held that a municipality cannot be held liable for an official policy or custom if it has been determined that the individual defendant did not violate the plaintiff's constitutional rights.

Although the facts of this case fall squarely within the parameters of *DeShaney's* rule that inaction by failing to protect a person from private harm does not give rise to a constitutional claim, Windle argues that the Seventh Circuit Court of Appeals erred in failing to consider whether she could premise a substantive due process claim against the City of Marion based upon the City's deliberate indifference to her situation which, in Windle's view, rises to a conscience-shocking level. Windle relies upon this Court's decision in *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998). In particular, Windle seizes upon the following language in *Lewis* to support her argument:

> "When such extended opportunities to do better are teamed with protracted failure even to care, indifference is truly shocking." *Lewis*, 523 U.S. at 853, 118 S.Ct. at 1720.

Lewis is inapplicable here as it applies only where government officials are under a recognized duty to act on behalf of the injured plaintiff. *Lewis* is not an alternative theory of liability where a plaintiff cannot demonstrate affirmative conduct by the government so as to fall within the narrow state-created danger exception.

Lewis comes into play only after the plaintiff demonstrates both a duty to act and affirmative conduct on the part of government actors. Only after a duty and affirmative

conduct is articulated by the plaintiff does any question arise as to whether that affirmative conduct taken is so egregious or outrageous as to shock the conscience. Sgt. Raymer and the City of Marion submit that *Lewis* has no application to failure to protect cases and cannot be utilized to make an end-run around *DeShaney*.

Indeed, in *Hernandez v. City of Goshen*, 324 F.3d 535 (7th Cir. 2003), the Seventh Circuit Court of Appeals recently decided that the *Lewis* "shocks the conscience" standard is inapplicable to a failure to act case. Jesus Hernandez and Ismael Garza were injured during a shooting spree in the workplace by a co-worker. The co-worker, Robert Wissman, got into a fight with another employee and threatened him with bodily harm. After Wissman left the plant, the supervisor called the local police department and spoke to an unidentified individual about the situation, indicating he feared for the safety of his employees. The supervisor was advised that the police department would not respond or get involved unless Wissman actually harmed someone. Wissman returned to the plant, shot and killed one employee, and injured Hernandez and Garza. They filed suit under 1983 alleging that the police department's conduct in not responding to the telephone call violated their substantive due process rights. The District Court dismissed the constitutional claims in reliance upon *DeShaney's* rule that a failure to protect an individual from private acts of violence does not rise to the level of a substantive due process violation.

On appeal, Hernandez and Garza argued that they were asserting a deliberate indifference, shocks the conscience substantive due process claim rather than a failure to protect claim. Rejecting their semantic gymnastics, the Seventh Circuit held that regardless of the words Hernandez and

Garza used to describe the City's conduct, the Complaint alleged liability under §1983 because the police department had a policy of not coming to the aid of persons who were at a foreseeable risk of harm and because its inadequate training of employees amounted to deliberate indifference. The Court held that the facts as pled did not establish a constitutional violation. In so doing, the Court rejected any application of the deliberate indifference standard or a shocks the conscience standard to a failure to protect claim:

> *First, neither Rochin nor Estelle nor Lewis is applicable here; in all of those cases and their progeny, §1983 liability arises from state action or inaction based on a recognized duty or affirmative course of conduct between the defendant state actor and the injured plaintiff. The critical difference in this case is that the City had no duty to the residents of Goshen to provide a police department whose policy is to investigate threats of violence, even credible ones, made by private persons and reported by private persons.* As the Supreme Court held in *DeShaney* and we recently reiterated in *Windle v. City of Marion, Indiana*, 321 F.3d at 660-61 (7th Cir. 2003), police departments have no constitutional duty to protect private persons from injuring each other, at least where the police department has not itself created the danger. Thus, no matter how egregious Hernandez and Garza might find the City's failure to investigate credible threats of private violence such as the one posed by Wissman, the City's conduct was not unconstitutional.
>
> Second, Hernandez and Garza had not presented any facts which would lead us to conclude that this case falls within the narrow "State-created

> danger" exception to *DeShaney*. We have recognized the possibility that a state actor might incur liability under §1983 if his or her conduct created or exacerbated the danger faced by the victim . . . .
>
> In this case, the pleadings allege that the Goshen Police Department learned from Nu-Wood plant manager Greg Oswald's phone call that employee Robert Wissman threatened to do bodily harm to Nu-Wood employees, and that Oswald knew Wissman had access to guns. No other evidence of the City's knowledge or involvement with the situation that Nu-Wood appears on the face of the complaint. This is even less information about the specific danger facing Hernandez and Garza than the police had in *Windle*, or the social workers had in *DeShaney*, and we therefore do not find that the City, through its police department's decision not to investigate the phoned-in threat, created or increased the danger faced by the Plaintiffs and their fellow Nu-Wood employees that day. 324 F.3d at 538-39 (Emphasis added) (Citations omitted).

The factual scenario in *Lewis* and its distinction from the facts here, demonstrates why a "shocks the conscience" test never applies in a failure to act situation. This Court granted certiorari in *Lewis* "to resolve a conflict among the Circuits over the standard of culpability on the part of a law enforcement officer for violating substantive due process in a pursuit case." 523 U.S. at 839, 118 S.Ct. at 1713. An innocent bystander died when a police patrol car skidded out of control during a high speed pursuit, striking a motorcycle and killing the passenger. In evaluating the proper substantive due process standard, the Court emphasized that "the touchstone of due process is protection of

the individual against arbitrary action of the government." *Id.* at 845, 118 S.Ct. at 1716. The Court warned that proving a substantive due process violation in a case involving government action is extremely unlikely as "cases dealing with abusive executive action have repeatedly emphasized that only the most egregious official conduct can be said to be 'arbitrary in a constitutional sense.'" *Id.* at 846, 118 S.Ct. at 1716.

This Court made clear that "the due process guarantee does not entail a body of constitutional law imposing liability whenever someone cloaked with state authority causes harm." *Id.* at 848, 118 S.Ct. at 1717. Rather, "conduct **intended to injure** in some way unjustifiable by any government interest is the sort of official action most likely to arise to the conscience-shocking level." *Id.* at 849, 118 S.Ct. at 1718. (Emphasis added). The Court also held that negligence is not enough to shock the conscience under any circumstance. *Id.* at 849, 118 S.Ct. at 1718. Windle fails to point to any evidence in the record which would even begin to suggest a deliberate intent to injure.

The key to *Lewis* is a duty to act coupled with deliberate and intentional action by the government. It is clear that Sgt. Raymer had no duty to act. Like the defendants in *Hernandez*, Sgt. Raymer was under no legal obligation to investigate the abuse by Rigsbee. The "shocks the conscience" standard should not be applied in this case merely because Sgt. Raymer had an opportunity to intervene sooner to stop the abuse. While it is disturbing that Rigsbee abused Windle, inaction by Sgt. Raymer neither created nor increased the danger to which Windle was already exposed. If Sgt. Raymer had never known of the abuse, the harm to Windle would have been the same or even greater. The fact that he learned of the abuse and

arguably did not intervene as soon as he might have creates no constitutional violation. As this case does not fall within the narrow confines of *Lewis*, there is no need for this Court to grant certiorari. The "shocks the conscience" standard applies only to the most egregious acts of intentional conduct in a situation where the government has a duty to act. As this is a failure to act case, *Lewis* has no application and Windle's misguided reliance upon *Lewis* does not provide an alternative basis for granting certiorari.

IV.

CONCLUSION

For all of the foregoing reasons, respondents respectfully request that this Honorable Court deny the Petition for Certiorari.

Respectfully submitted,

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No. 03-21

IN THE

Supreme Court of the United States

CHAUNCE WINDLE,

Petitioner,

v.

CITY OF MARION, INDIANA, a municipal corporation, CITY OF MARION, INDIANA POLICE DEPARTMENT, and ROB RAYMER, SERGEANT, in his official and individual capacity,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

When this Court established the state created danger theory in its decision in *DeShaney v. Winnebago County Department of Social Services*, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 421 (2001), the Court provided lower courts with no guidance for applying the theory. Circuit Courts of Appeal have embraced the theory and have established tests to determine whether the state has created or enhanced danger to a plaintiff in a 42 U.S.C. § 1983 action. Left to their own devices, the Circuit Courts developed tests that vary among the Circuits. As a result, justice for plaintiffs in § 1983 actions depends on the location of the plaintiff's domicile. Under the same set of facts, and because of the varying tests, justice had in one Circuit could elude a plaintiff in another Circuit. This Honorable Court should grant Petitioner, Chaunce Windle's (hereinafter "Chaunce") Petition for Writ of Certiorari to resolve this split among the Circuits and decide an important, yet unresolved, question of constitutional law.

THE UNDERLYING FACTS

This action arises out of the sexual and emotional abuse of a child, Chaunce. She was being sexually abused by Carol Rigsbee (hereinafter "Rigsbee"), her middle school teacher. Rigsbee frequently called Chaunce and had sexually explicit conversations with the child. Police officers on the City of Marion, Indiana Police Department intercepted these calls and listened to them for entertainment purposes. When officers knew Chaunce's name and that the abuser was a Jones Middle School teacher, they did not act to end the abuse. To the contrary, officers took affirmative actions that prevented assistance for Chaunce. Not until they heard her mention suicide or running away, did the officers intervene and end the abuse.

Respondents urge this Court to consider only the actions of Sergeant Raymer (hereinafter "Raymer") in this case. The Respondents' argument that only Raymer's acts should be considered by this Court, because he was the only officer

named individually, is misguided. The caption to this case names the City of Marion, Indiana Police Department; therefore, this Court should consider the actions of all of the Department's officers that increased the harm to Chaunce.

Lieutenant Andrea Alter-Dunn acted affirmatively when she told a subordinate officer, Gary Henderson, that there was nothing they could do to help Chaunce because the information was received through illegal intercept. Officer Henderson testified that he felt Lt. Alter-Dunn's words were a Department directive not to intervene despite the fact that he felt Chaunce was in a position of being harmed by Rigsbee's sexual abuse. Ultimately, the directive from Lt. Alter-Dunn enhanced the danger Chaunce faced.

Even if this Court ignores the affirmative acts of Lt. Alter-Dunn and focuses solely on the affirmative acts of Raymer, Chaunce's Petition for Writ of Certiorari should be granted. Raymer acted outside Department protocol for investigating a suspected child abuse situation by conducting his own "private investigation." Raymer did not file a report of his suspicions of child abuse immediately as required by the Department. In fact, former City of Marion, Indiana Chief of Police, David Homer, testified that Raymer was disciplined for "withholding, mishandling, misuse or removal of official records, information or evidence without prior authorization." Dep. of David Homer, August 9, 2001, pg. 29, lns. 12-14.

To argue that there were no affirmative acts that enhanced the danger to Chaunce denies the testimony of Ann Presnall, a therapist experienced in counseling child victims of sexual abuse, who counseled Chaunce following her abuse. Ms. Presnall was adamant in her testimony that each exposure to Rigsbee, was more harmful to Chaunce:

> My opinion about that is that in my training and through conferences and workshops what we have learned is that exposing a child to a perpetrator when there has not been any clinical intervention, legal intervention, that many times that perpetrator is trying to continue that relation-

> ship that is destructive to the child and it's not just the sexual acts that are destructive. It's the emotional manipulation that is really destructive to the kid and that is what was going on in that situation and that was very difficult for Chaunce. It was harmful to her.

Deposition testimony of Ann Presnall, January 10, 2002, pg. 65, lns. 15-25, (objection, "foundation").

Ms. Presnall further testified about the increased danger and harm to Chaunce that occurred as a result of Respondents' actions:

> My opinion is that with repeated exposure to the individual who perpetrated upon Chaunce that there was, again, the heightened state of arousal that Chaunce experienced during the conversations, the anxiety, nightmares, feelings of helplessness, hopelessness that those continued and again caused her harm.

Deposition testimony of Ann Presnall, January 10, 2002, pg. 76, lns. 16-22, (over objection, "vague"). According to Ms. Presnall's testimony, the Respondents' affirmative acts allowed Rigsbee continued exposure to Chaunce, and therefore, enhanced the child's danger.

Ms. Presnall's uncontroverted testimony was referenced substantially throughout Chaunce's briefing, and her testimony was provided as exhibits for the District Court and for the Seventh Circuit. Pointedly, neither Respondents, the District Court, nor the Seventh Circuit have acknowledged Ms. Presnall's testimony.

REASONS FOR GRANTING THE WRIT

I. THERE IS A CONFLICT AMONG THE CIRCUITS CONCERNING WHEN THE GOVERNMENT MAY BE HELD LIABLE FOR A "STATE-CREATED DANGER."

A. The facts of *Windle* are distinguishable from the facts of *DeShaney*.

Respondents, as well as other governmental defendants, would have this Court believe that the mere invocation

"*DeShaney*" is a complete bar of a Plaintiff's claim against police officers and departments for a substantive due process violation under 42 U.S.C. §1983. However, the situation in *Windle* is distinguishable from *DeShaney*. First, there is a difference in terms of the awareness of the government officers as to the danger to the child. The Seventh Circuit noted that the State actors in *DeShaney* "may have been aware that a child was being abused." *Windle v. City of Marion, et al.*, 321 F.3d 658, 662 (7th Cir. 2003). Under the facts in *Windle*, there is no question that the Respondents knew Chaunce was being abused. It is not enough for Respondents to invoke *DeShaney* and for the courts to say the facts of *Windle* are indistinguishable.

Second, in this case and unlike *DeShaney*, the state has created and/or enhanced the danger Chaunce faced. As discussed above, government officers took affirmative actions to prevent investigation of the case and protect Chaunce. Thus, *Windle* poses important questions not resolved by *DeShaney*, namely: whether due process is violated when government officials, to the great harm of a child, unquestionably know of a danger and take affirmative steps to ensure that the danger is not addressed.

B. The Circuit split in applying the state created danger theory is significant and should be addressed by this Court.

In their discussion of the various tests applied by Circuit courts, Respondents acknowledge the split in the Circuits. Respondents' Brief in Opposition, pg. 9. The various tests Circuits utilize to make this outcome-determinative decision are more than "slightly different" as Respondents assert. Respondents try to argue that Chaunce would lose under the various tests in other Circuits, but this argument misses the key and relevant point to granting Chaunce's Petition. In her Petition, Chaunce asks this Court to address the Circuit split regarding a key constitutional issue. However, in response to Respondents' argument and contrary to their assertion,

Chaunce clearly would prevail under the tests of Circuits other than the Seventh.

Regarding the test applied by the Fifth Circuit, Respondents argue that Chaunce ignored the "significant hurdles" necessary to prove the state actors acted with deliberate indifference, the second prong of the Circuit's two-prong test for state created danger. Respondents' Brief in Opposition, pg. 14. In support of this argument, Respondents rely upon *McClendon v. City of Columbia*, 305 F.3d 314 (5th Cir. 2002)(en banc), *cert. denied*, __ U.S. __, 123 S.Ct. 1355, 155 L.Ed.2d (2003). Respondents quote *McClendon* by stating:

> To establish deliberate indifference, a state actor must know of and disregard an excessive risk to the [victim's] health and safety. The state actor's actual knowledge is critical to the inquiry. A state actor's failure to alleviate a significant risk that he should have perceived but did not, while no cause for commendation, does not rise to the level of deliberate indifference.

McClendon, 305 F.3d at 326.

This language quoted by Respondents shows exactly why Chaunce should prevail under the Fifth Circuit's test. Raymer and other officers knew of the harm Chaunce endured. Even the Seventh Circuit has now acknowledged that the police officers knew of the danger Chaunce faced, and that they did not intervene until she had reached a crisis point two months after officers were aware of the abuse. In *Hernandez v. City of Goshen et al.*, the Seventh Circuit found:

> In *Windle* we found no § 1983 liability where police officers learned of potential danger to the plaintiff, Chaunce Windle, by listening to conversations between her and her sexual abuser over a police scanner but did not investigate the situation or act to prevent further abuse for a period of about two months. *Id.*, 2003 U.S. App. LEXIS 3880 at 3, 2003 WL 728964, at *2. We said in *Windle* that, just as the social workers in *DeShaney* knew that Joshua DeShaney's father was abusing him but did not stop the abuse, the mere fact that

> the officers knew that Chaunce Windle faced danger but did not intervene until the situation reached crisis did not mean that the officers created the danger or made it worse for the purpose of imposing § 1983 liability. *Windle*, 2003 U.S. App. LEXIS 3880 at 5, 2003 WL 728964, at *2.

324 F.3d 535, 538-539 (7th Cir. 2003). By finding the officers did not respond for two months and noting the officers were aware of the danger Chaunce faced and endured, the Seventh Circuit has acknowledged facts that justify a finding of a constitutional violation under the two-pronged test of the Fifth Circuit because Respondents acted with deliberate indifference.

In their discussion of the Tenth Circuit test for state created danger, Respondents argue that the test "requires at the very least, a high level of outrageousness." Respondents' Brief in Opposition, pg. 12, citing *Uhlrig v. Harder*, 64 F.3d 567, 574 (10th Cir. 1995), *cert. denied*, 516 U.S. 1118, 116 S.Ct. 924, 133 L.Ed.2d 853 (1996). The facts of this case are outrageous. Police officers eavesdropped on Chaunce's sexual abuse for entertainment purposes, took affirmative steps to prevent fellow officers from intervening on her behalf, and enhanced the danger to Chaunce to the point that she was willing to commit suicide before they ended her abuse. The fact that officers intervened when they believed Chaunce would kill herself indicates that they were aware that the danger she faced had been enhanced and had escalated. It is outrageous to common sensibilities, and should be to the judicial conscience, to contemplate that those who purport to "protect and serve" are entertained by a child's suffering so much so that they would prevent fellow officers from ending the sexual abuse by helping the child.

Additionally, in their discussion of the Tenth Circuit test for state created danger, Respondents argue that, "Sgt. Raymer did not create or exacerbate any danger to Windle because she was in 'no worse position than [she] would have

been had [defendants] not acted at all.' *DeShaney*, 489 U.S. at 201, 109 S.Ct. at 1006." Respondents' Brief in Opposition, pg. 13. Certainly, this is not the case. Consider again the testimony of therapist, Ann Presnall:

> My opinion is that with repeated exposure to the individual who perpetrated upon Chaunce that there was, again, the heightened state of arousal that Chaunce experienced during the conversations, the anxiety, nightmares, feelings of helplessness, hopelessness that those continued and again caused her harm.

Deposition testimony of Ann Presnall, January 10, 2002, pg. 76, lns. 16-22, (over objection, "vague").

Raymer conducted an unauthorized "private investigation" rather than following Department protocol which required making an official police report of the incident. Had he made such a report, Chaunce's abuse would have ended much sooner. Raymer's "private investigation" served to exacerbate the danger Chaunce faced.

Respondents have acknowledged that exposure to a sexual abuser is harmful. Lt. Alter-Dunn testified to this fact during her deposition taken on August 9, 2001. Therefore, Respondents' actions did leave Chaunce in a worse position than she would have been had they not acted at all. *DeShaney*, 489 U.S. at 201.

The tests used by the Circuit Courts of Appeal to determine a state created danger claim are varied to the extent that the outcome of such a claim is dependant upon the Circuit in which a claim is filed. Although this Court spawned the State Created Danger Theory in its *DeShaney* opinion, the United States Supreme Court is yet to provide guidance to lower courts for application of the Theory. For this reason, Chaunce's Petition for Writ of Certiorari should be granted.

II. THIS COURT SHOULD GRANT CERTIORARI BECAUSE THE COURT OF APPEALS ERRED IN DENYING LIABILITY FOR CONDUCT BY GOVERNMENT OFFICERS THAT WAS DELIBERATELY INDIFFERENT AND CONSCIENCE SHOCKING.

Respondents begin their argument of this issue by stating the Seventh Circuit finding is correct that Chaunce suffered no constitutional violation by the City of Marion because there was no underlying constitutional violation by Raymer. Respondents base this assertion on *City of Los Angeles v. Heller*, 475 U.S. 796, 106 S.Ct. 1571, 89 L.Ed.2d 806 (1986). Specifically, Respondents cite this Court's holding in *Heller* that "a municipality cannot be held liable for an official policy or custom if it has been determined that the individual defendant did not violate the plaintiff's constitutional rights." Respondents' Brief in Opposition, pg. 17, citing *Heller*, 475 U.S. at 799.

The *Heller* opinion is, however, drawn into question by a strong dissenting opinion. In his dissent, Justice Stevens stated:

> The Court mistakenly assumes that there was a necessary inconsistency between the verdict of no liability against the individual officer and a possible verdict against the municipal defendants; it then mistakenly assumes that dismissal was an appropriate response to the perceived inconsistency. Perhaps not coincidentally, the Court achieves these results without the aid of briefs or argument, and relies on an anonymous author to explain what it has done.

Heller, 475 U.S. at 808.

There is, however, significant uncertainty and conflict in the lower courts as to when *Heller* precludes a suit against a city if individual officers have been held not liable. Lower courts have questioned and refused to follow the holding in *Heller*. The Eighth Circuit addressed the holding of *Heller* by finding:

> Our court has previously rejected the argument that *Heller* establishes a rule that there must be a finding that a municipal employee is liable in his individual capacity as a predicate to municipal liability. *See Praprotnik v. City of St. Louis*, 798 F.2d 1168, 1172-73 n. 3 (8th Cir. 1986), *rev'd on other grounds*, U.S. 112, 108 S.Ct. 915, 99 L.Ed.2d 107 (1988); *see also Parrish v. Luckie*, 963 F.2d 201, 207 (8th Cir. 1992) ("A public entity or supervisory official may be liable under § 1983, even though no government individuals were personally liable.")

Speer v. City of Wynne, 276 F.3d 980, 985-86 (8th Cir. 2002).

The *Speer* court also found that municipal liability may arise based upon the combined actions of multiple officials even though no one individual's actions rise to the level of constitutional violation. *Id.* at 986. While Chaunce in no way concedes that Raymer did not violate her constitutional rights, under the decisions cited above, it is also possible to find municipal liability based upon the combined actions of the Respondents, including employees of the City of Marion and the City of Marion Police Department who were not individually named.

Next, Respondents argue that *County of Sacramento v. Lewis*, 523 U.S. 833, 118 S.Ct. 1708, 140 L.Ed.2d 1043 (1998) does not apply to *Windle*. However, the key factor in the determination of whether an act is conscience shocking or demonstrative of deliberate indifference is the actor's opportunity to deliberate. *Lewis* 523 U.S. at 851. The "ability to deliberate" aspect of the determination of whether an action is conscience shocking is as relevant to a police pursuit as it is in the matter at hand. Here, as the Seventh Circuit found, Respondents had two months to deliberate their actions. *Windle*, 321 F.3d at 660. Yet, Respondents took no action to end the abuse; rather, they took deliberate actions that prolonged Chauce's suffering.

In their discussion of *Lewis*, Respondents state that only government action that intends to injure rises to the level of

conscience shocking. Further, they argue that Chaunce has provided no evidence that Respondents had any deliberate intent to injure. The Seventh Circuit acknowledged that Respondents listened to the sexual abuse of Chaunce when things were slow on night shift and that they listened for entertainment purposes. Officers knew that a child was being sexually abused which was harmful. They knew Chaunce's name and that the abuser was a teacher at Jones Middle School. Respondents' intent must have been to harm if they took affirmative acts to discourage fellow officers from intervening, an act that would have immediately ended their perverse nighttime entertainment. Respondents literally chose their own entertainment over protecting a child. The intent to harm is evident in the facts.

This Court should grant certiorari to review the *Windle* decision. In today's society, where horrific instances of child abuse are continually in the evening news, do we, as a Nation, want our law to deny justice to sexually abused children where police officers know of the danger a child faces and take actions that prevent others from helping until the child reaches crisis? In Chaunce's case, the Respondents only intervened when they had allowed the danger she faced to increase to the point where they heard her mention running away from home or committing suicide. It took Respondents at least two months of listening to the abuse to decide to intervene. Must sexually abused children die at their own hands before our Nation's courts hold police officers accountable for not intervening to help, or worse, as in Chaunce's case, for taking affirmative actions to prevent anyone else from intervening?

CONCLUSION

This Court should grant this Petition and directly address the test applied to determine whether the state created a Plaintiff's danger and whether the actions of Respondents were conscience shocking and deliberately indifferent to the plight of a sexually abused child.

Respectfully submitted,

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